IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0478

CITY OF HELENA,

Plaintiff and Appellee,

v.

MATTHEW GORDON MAYFIELD,

Defendant and Appellant.

BRIEF OF *AMICI CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION AND AMERICAN CIVIL LIBERTIES UNION OF MONTANA IN SUPPORT OF DEFENDANT-APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Mike Menahan, Presiding

---

APPEARANCES:

ALEX RATE
AMERICAN CIVIL LIBERTIES UNION OF MONTANA
P.O. Box 1968
Missoula, MT 59806
(406) 224-1447
ratea@aclumontana.org

JEFFREY M. MURPHY*
FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION
510 Walnut Street, Suite 900
Philadelphia, PA 19106
(215) 717-3473
jeff.murphy@fire.org

Counsel for Amici Curiae

---

* *Pro hac vice* forthcoming.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended these rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating First Amendment freedoms, without regard to speakers' views. FIRE frequently represents and advocates on behalf of individuals across the United States who have suffered retaliation by the police for exercising their First Amendment right to criticize public officials. *See*, *e.g.*, *Villareal v. City of Laredo*, 94 F.4th 374 (5th Cir. 2024) (en banc), *vacated*, *Villareal v. Alaniz*, 145 S. Ct. 368 (2024); Compl., *Rishel v. City of Allentown*, No. 5:25-cv-03779 (E.D. Pa. July 23, 2025); Compl., *Gibbons v. City of Kingsport*, No. 2:23-cv-00138 (E.D. Tenn. Oct. 17, 2023); Compl., *Bombard v. Riggen*, No. 21-CV-176 (Vt. Super. Ct. Feb. 3, 2021).

[1] No counsel for a party authored this brief in whole or in part. Further, no person, other than *amici*, their members, or their counsel contributed money intended to fund this brief's preparation or submission. All parties consented to the filing of this brief.

FIRE also regularly participates as *amicus* in cases concerning police retaliation against protected expression. *See, e.g.,* Brief of FIRE as *Amicus Curiae* in Supp. of Petitioner, *Frese v. Formella*, No. 22-939, 144 S.Ct. 72 (2023); Brief of FIRE, et al., as *Amici Curiae* in Supp. of Pl.-Appellant, *Bailey v. Iles*, 87 F.4th 275 (5th Cir. Nov. 14, 2022); Brief of FIRE as *Amicus Curiae* in Supp. of Pl.-Appellant and Reversal, *Novak v. City of Parma, Ohio*, 33 F.4th 296 (6th Cir. Aug. 6, 2021).

FIRE likewise routinely defends the First Amendment rights of law enforcement and military members. *See, e.g.*, Compl., *Meeks v. Lawrence*, No. 3:25-cv-01431 (M.D. Tenn. Dec. 10, 2025); Compl., *Bushart v. Perry Cnty.*, No. 1:25-cv-01288 (W.D. Tenn. Dec. 17, 2025); Compl., *Gray v. City of Alpharetta*, No. 1:23-cv-00463-MLB (N.D. Ga. Jan. 31, 2023).

The American Civil Liberties Union of Montana is a non-profit, non-partisan membership organization devoted to protecting civil rights and liberties for all Montanans. The American Civil Liberties Union (together, "ACLU"), with more than two million members, is among the oldest, largest, and most active civil rights organizations in America. For decades, the ACLU has litigated questions involving civil rights and

liberties in the state and federal courts, including cases involving the First Amendment.

Amici's work therefore encompasses advocacy for keeping the "starch in our constitutional standards," *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004) (internal quotation marks and citation omitted), especially those governing the "few categories where the law allows content-based regulation" as a "general exception to the First Amendment" for unprotected speech. *United States v. Alverez*, 567 U.S. 709, 718, 720 (2012). That includes "fighting words" under *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942), even if the doctrine has largely lost force as a category of unprotected speech. *See*, *e.g.*, *Counterman v. Colorado*, 600 U.S. 66, 77 n.4 (2023).

Amici file this narrow brief in support of Defendant-Appellant, Matthew Gordon Mayfield, to explain why this Court's fighting words decision in *State v. Robinson*, 2003 MT 364, 319 Mont. 82, 82 P.3d 270—upon which the trial court erroneously relied, (MC Ord. on Mot. to Suppr. ¶¶ 12, 17–20 (July 18, 2023))—must be expressly overruled. *Robinson* held that speech can be punished as fighting words if it is "sufficiently and inherently inflammatory" and fails to contribute "to our

constitutionally-protected social discourse." *Robinson*, ¶¶ 22, 24. If speech can be punished merely because—in the government's view—it is inflammatory and/or fruitless, the government could suppress speech entitled to the highest level of protection under the First Amendment. Moreover, even if this Court finds little value in the remarks at issue in *Robinson*, speech on the periphery of the First Amendment is afforded protection to safeguard freedom of expression.

INTRODUCTION AND SUMMARY OF ARGUMENT

The right to criticize the government and its officials is at the heart of the First Amendment. *See Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). This is no less true when criticism is expressed in vitriolic or even profane language and directed toward police officers. *See Payne v. Pauley*, 337 F.3d 767, 776 (7th Cir. 2003). As this Court has explained: "The concern which all citizens have in the proper conduct of public affairs by public officials requires that there be wide freedom to criticize that conduct, even though the criticism be unjustified or extravagant." *Skinner v. Pistoria*, 194 Mont. 257, 262, 633 P.2d 672, 675 (1981).

Yet, in *Robinson*, ¶ 3, this Court held that calling a police officer a "fucking pig" constitutes unprotected fighting words because it perceived the condemnation as "sufficiently and inherently inflammatory" to not contribute "to our constitutionally-protected social discourse." *Robinson* was wrong the day it was decided, s*ee* Thomas W. Korver, *State v. Robinson: Free Speech or Itchin' for a Fight*, 65 MONT. L. REV. 385, 387 (2004), and subsequent developments in the law render it all the more untenable.

Both the United States Supreme Court and this Court have consistently held that whether speech rises to the level of fighting words turns on whether the speech is likely to provoke *immediate violence*. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) (quoting *Cohen v. California*, 403 U.S. 15, 20 (1971)) (fighting words are "'those personally abusive epithets which, when addressed to the ordinary citizen, are … inherently likely to provoke violent reaction'"); *City of Billings v. Nelson*, 2014 MT 98, ¶ 23, 374 Mont. 444, 322 P.3d 1039. *Robinson*'s rationale dramatically deviates from this analysis.

It is never enough that speech is merely inflammatory, and it is wholly irrelevant whether—in the court's view—the speech is valuable to

public debate. Without more, speech that is seemingly fruitless and/or inflammatory, even egregiously so, is not beyond constitutional protection. *See*, *e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957).

The aberrational definition of fighting words in *Robinson* poses particular danger to freedom of expression. If all that must be present to punish speech as fighting words is that it does not contribute "to our constitutionally-protected social discourse" and is "sufficiently and inherently inflammatory," the government would hold the authority to regulate entire swaths of speech entitled to *core* First Amendment protection. That is not the law.

The First Amendment safeguards speech even on the outer edges of constitutional protection in order to ensure freedom of expression. If this Court lets those outer edges erode, it will take core protected speech with it. Montanans have the right to criticize their public officials—even with derogatory language. *Robinson* is plainly inconsistent with the First Amendment, and this Court should therefore overrule it. Therefore, to the extent the trial court relied on *Robinson* in denying Mayfield's motion to suppress evidence, its decision should be reversed.

ARGUMENT

Robinson should be overruled as the facts and speech at issue, and the legal analysis applied, demonstrate the inapplicability of the fighting words doctrine. As Robinson crossed an intersection, he glared at a police officer sitting in his patrol and called him a "'fucking pig.'" *Robinson*, ¶ 3. The officer then approached Robinson on foot and told him "'he now had [his] attention'" and asked him "'if there was anything he wanted to talk about,'" to which Robinson responded, "'Fuck off, asshole.'" *Id.* ¶ 3. The officer then arrested Robinson for disorderly conduct under § 45–8–101, MCA, which criminalizes "knowingly disturb[ing] the peace by ... using threatening, profane, or abusive language." *Id.* ¶ 3. This Court has long interpreted this provision as reaching only fighting words. *See*, *e.g.*, *Id.* ¶ 9; *City of Billings v. Batten* (1985), 218 Mont. 64, 69, 705 P.2d 1120, 1124.

Robinson argued his speech was constitutionally protected, but this Court held his remarks to the officer constituted unprotected fighting words because they did not contribute "to our constitutionally-protected social discourse." *Robinson*, ¶ 22.[2] According to the Court, "[i]f the

[2] This Court decided *Robinson* "strictly on *federal* constitutional grounds." ¶ 8 (emphasis added).

statements in question had been uttered in the context of a political rally or protest, free speech concerns might well prevail," but calling someone a "'f* * * * * pig' qualifies as sufficiently and inherently inflammatory, irrespective of the intended audience," to constitute fighting words. *Id.* ¶¶ 22, 24. That conclusion misunderstood and misapplied that doctrine.

I. Free speech and the fighting words doctrine.

"The right to free speech is a fundamental personal right and 'essential to the common quest for truth and the vitality of society as a whole.'" *State v. Dugan*, 2013 MT 38, ¶ 18, 369 Mont. 39, 303 P.3d 755 (quoting *St. James Healthcare v. Cole*, 2008 MT 44, ¶ 26, 341 Mont. 368, 178 P.3d 696). If the First Amendment means anything, it means the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). The United States Supreme Court has long recognized that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The government therefore "must abstain from regulating speech

when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

To be sure, "[t]he protections afforded by the First Amendment … are not absolute," as "the government may regulate certain categories of expression consistent with the Constitution." *Black*, 538 U.S. at 358; *see Chaplinsky*, 315 U.S. at 571–572. Among these narrow, limited categories of unprotected expression are incitement, obscenity, defamation, speech integral to criminal conduct, child pornography, fraud, true threats, and—relevant to this appeal—fighting words. *United States v. Alvarez*, 567 U.S. 709, 717 (2012). However, these are fixed and narrowly limited categories of speech. *United States v. Stevens*, 559 U.S. 460, 470–71 (2010).

"The unprotected category of speech called 'fighting words' is an *extremely narrow* one." *Johnson v. Campbell*, 332 F.3d 199, 212 (3d Cir. 2003) (emphasis added). The United States Supreme Court defines fighting words as only those words "which by their very utterance … tend to incite an immediate breach of the peace." *Chaplinsky*, 315 U.S. at 571–572. This Court likewise defines fighting words as those "that have a

direct tendency to violence." *City of Billings v. Batten* (1985), 218 Mont. 64, 69, 705 P.2d 1120, 1124. Yet its decision in *Robinson* applies the doctrine far more broadly.

II. *Robinson* failed to apply the proper fighting words analysis.

Whatever disagreements there may be among lower courts about how to apply the fighting words doctrine, the crux of the analysis is whether the speech is likely to provoke *immediate violence*. *Robinson*, however, rested its holding on a different (and dangerous) rationale—that the speech was "sufficiently and inherently inflammatory" and failed to contribute "to our constitutionally-protected social discourse." *Robinson*, ¶¶ 22, 24. That is simply the wrong analysis.

It is never enough that speech is merely inflammatory, and it is wholly irrelevant whether—in the court's view—the speech is valuable to public debate. Without more, speech that is seemingly fruitless and/or inflammatory, even egregiously so, is not without constitutional protection. *Robinson*'s application of the fighting words doctrine contravened controlling United States Supreme Court decisions, deviated from this Court's precedents, and continues to constitute an aberration in this Court's fighting words jurisprudence.

It appears the *Robinson* Court was led astray by *dicta* in *Chaplinsky* that described categories of unprotected expression as "no essential part of any exposition of ideas" and "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. But the United States Supreme Court—and this Court—have explained that this *dicta* merely *described* the speech rather than "set[ting] forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary." *Stevens*, 559 U.S. at 470–71; *Dugan*, ¶ 44.

This Court's post-*Robinson* fighting words decision in *Dugan*, which explained that even speech "certainly not of high social value … or beneficial to the pursuit of truth" is nevertheless "not automatically rendered proscribable on the basis of these shortcomings," ¶ 44, effectively overruled *Robinson*. The Court reasoned that, while "Dugan's choice of words was among the most distasteful in our vocabulary," preservation of free speech requires the government have "'no right to cleanse public debate to the point where it is grammatically palatable to

the most squeamish among us.'" *Id.* ¶ 44 (quoting *Cohen*, 403 U.S. at 25). Rather, "[e]xpletives and insults, no matter how distasteful, can be constitutionally proscribed only if they fall within one of the narrow and limited categories of unprotected speech." *Id. Robinson* is plainly incompatible with *Dugan,* and *Dugan* should therefore be understood as implicitly overruling *Robinson*.

Moreover, in the nearly 85 years since *Chaplinsky*, the United States Supreme Court has—not coincidentally—never again upheld a conviction under the fighting words doctrine. *See Counterman*, 600 U.S. at 77 n.4; *see also Dugan*, ¶ 21. While the Court continues—at least abstractly—to recognize fighting words as a category of unprotected expression, *see, e.g., Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 791 (2011), it has reversed every single fighting words conviction it has reviewed since *Chaplinsky*. *See Dugan*, ¶ 21. Nearly 55 years ago—and only 30 years after *Chaplinsky* was decided—Justice Blackmun alleged the Court, "despite its protestations to the contrary," was already "merely

paying lip service to *Chaplinsky*." *Gooding v. Wilson*, 405 U.S. 518, 537 (1972) (Blackmun, J., dissenting).[3]

Therefore, as Nadine Strossen, FIRE senior fellow and former president of the ACLU, explained over 35 years ago, there are persuasive arguments "that *Chaplinsky*'s fighting words doctrine is no longer good law." Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 510.

Given the less-than-favorable subsequent treatment of the fighting words doctrine, lower courts should take care to limit its application to expression that satisfies the doctrine's narrow definition. That is why *Robinson*'s deviation from the proper definition of fighting words renders

---

[3] This Court asserted in *Dugan* the authority to, in comparison to the United States Supreme Court, maintain "a greater willingness to uphold convictions based on 'fighting words.'" ¶ 28. While the *Robinson* Court was correct that this Court is not bound by the decisions of federal courts of appeal, ¶ 14, it *is* bound by the decisions of the United States Supreme Court on questions of federal law. The United States Supreme Court is the final arbiter of the scope of federal constitutional protections, *James v. City of Boise*, 577 U.S. 306, 306–07 (2016) (per curiam), and "[s]tates may not disregard a controlling, constitutional command in their own courts." *Montgomery v. Louisiana*, 577 U.S. 190, 198 (2016); *see also Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340–41 (1816). Ironically, the *Robinson* Court acknowledged the United States Supreme Court's apex authority over the meaning of federal law but nevertheless ran afoul of the Court's fighting words cases.

it untenable. And it is all the more incompatible with the First Amendment because the definition the Court substituted poses a particularly dangerous threat to speech entitled to the highest level of protection—namely, speech critical of the government.

III. *Robinson* is all the more wrong because its misapplication of fighting words poses a particular danger to free speech.

The speech at issue in *Robinson* may to some "seem at first blush too inconsequential to find its way into" this Court's books, "but the issue it presents is of no small constitutional significance." *Cohen*, 403 U.S. at 15. *Robinson*'s anomalous definition of fighting words encompasses clearly protected expression, including speech at the core of First Amendment protection.

The First Amendment protects "speech that is critical of those who hold public office," *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988), and that is no less true when the speech is "vehement, caustic, and sometimes unpleasantly sharp." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This Court has recognized the same principle, reasoning that "[c]riticism of government is at the very center of the constitutional protection of free speech," and therefore "criticism of those responsible for government operations must be free, lest criticism of

government itself be penalized." *Mont. Auto. Ass'n v. Greely*, 193 Mont. 378, 387, 632 P.2d 300, 305 (1981). Punishing speech critical of public officials "not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it." *Garrison*, 379 U.S. at 79–80 (Black, J., concurring).

Free speech includes "the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation." *Baumgartner v. United States*, 322 U.S. 665, 674–75 (1944); *see also Bridges v. California*, 314 U.S. 252, 270 (1941) (the First Amendment protects the right "to speak one's mind, although not always with perfect good taste"). Criticism of public officials "will not always be reasoned or moderate," *Hustler*, 485 U.S. at 51, but "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided and likely to cause anguish or incalculable grief." *303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023). As this Court recently explained, "it would be a frightening departure if we were to begin imposing criminal liability on defendants because we found their responses to an officer's

questions lacking in etiquette." *State v. Bennett*, 2022 MT 73, ¶ 11, 408 Mont. 209, 213, 507 P.3d 1154, 1157.

And the right to criticize government officials—even with sharply critical language—extends to police officers. *See City of Houston v. Hill*, 482 U.S. 451, 461 (1987). The First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers," *id.*, including that which is "'provocative and challenging.'" *Id.* (quoting *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949)). This freedom "to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." *Id.* at 462–63. Police officers "may resent having obscene words and gestures directed at them," but "they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." *Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990).

It is irrelevant whether Robinson was expressing a reasoned opinion or ignorant antagonism, *Terminiello*, 337 U.S. at 4, as "many things done with motives that are less than admirable are protected by the First Amendment." *Hustler*, 485 U.S. at 53. "[E]ven when a speaker

or writer is motivated by hatred or illwill," rather than reasoned disagreement, "his expression [remains] protected by the First Amendment." *Id.* While "[f]its of rudeness … may violate the Golden Rule," that does not "make them illegal or … punishable." *Cruise-Gulyas v. Minard*, 918 F.3d 494, 495 (6th Cir. 2019).

The mere fact Robinson expressed his contempt for the police with expletives rather than erudite exposition does not diminish the constitutional protection to which his speech was entitled. *See Hurley v. Irish–American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 569 (1995). Speech "conveys not only ideas capable of relatively precise, detached explication," but also "inexpressible emotions." *Cohen*, 403 U.S. at 25–26. While the First Amendment of course protects "the cognitive content of individual speech," it also protects its "emotive function," which "may often be the more important element of the overall message sought to be communicated." *Id.*

"Giving offense is a viewpoint," *Matal v. Tam*, 582 U.S. 218, 243 (2017), and speech may "best serve its high purpose when it … stirs people to anger." *Terminiello*, 337 U.S. at 4. As Justice Harlan famously declared, "one man's vulgarity is another's lyric," *Cohen*, 403 U.S. at 15,

so it is for *the People*—not the government—to decide which is which. *See also Hurley*, 515 U.S. at 574. The First Amendment at its core "confirms the freedom to think for ourselves." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 356 (2010). This Court was wrong in *Robinson* to turn a merely provocative, challenging, or even subjectively offensive epithet directed at a police officer into fighting words outside the First Amendment's protection.

IV. Robinson's speech was protected even under a proper application of the fighting words doctrine.

The Court should also overrule *Robinson* because, under proper application of the fighting words doctrine, the speech in that case was protected. Robinson's remarks to the officer, while not congenial, do not even *approach* what the United States Supreme Court has deemed unprotected expression.

Nearly fifty years ago, the Court upheld the free-speech rights of Nazis to march through Skokie, Illinois—a town with not only a large Jewish population but of *Holocaust survivors*. *See National Socialist Party of America v. Skokie*, 432 U. S. 43, 43–44 (1977) (*per curiam*). About a decade later, the Court held burning the American flag was protected expression rather than proscribable fighting words, notwithstanding the

profound offense some take to the expression—particularly to those "who have had the singular honor of carrying the flag in battle." *Johnson*, 491 U.S. at 421 (Kennedy, J., concurring). More recently, the Court upheld the First Amendment right of Westboro Baptist Church members to picket outside a soldier's funeral with signs such as "God Hates the USA/Thank God for 9/11," "Thank God for Dead Soldiers," and "God Hates Fags." *Snyder*, 562 U.S. at 452.

Nor do Robinson's remarks exceed the bounds of expression other courts have deemed short of fighting words. *See, e.g., United States v. Bartow*, 997 F.3d 203, 211 (4th Cir. 2021) (holding that even the most egregious racial slur is not a fighting word *per se*). In fact, other courts routinely hold that the *precise* words Robinson directed at the officer, calling him a "fucking pig," constitute protected expression. *See, e.g., Wood v. Eubanks*, 25 F.4th 414, 423, 425 (6th Cir. 2022); *State v. John W.*, 418 A.2d 1097, 1103, 1108 (Me. 1980); *In re Welfare of S.L.J.*, 263 N.W.2d 412, 419–20 (Minn. 1978). They have likewise held that calling a police officer an "asshole" does not constitute unprotected fighting

words,[4] nor does saying "fuck you" to law enforcement.[5] The same result attends other profane epithets directed toward the police. *See, e.g., Johnson v. Campbell*, 332 F.3d 199, 203, 213 (3d Cir. 2003) ("son of a bitch"); *State v. Dotson*, 133 Ohio App. 3d 299, 301, 303 (Ohio Ct. App. 1999) ("motherfuckers").

These decisions reflect that the police can and should be expected to maintain a higher level of restraint when confronted with harsh criticism, and certainly cannot justifiably escalate verbal confrontations while claiming authority to punish criticism as fighting words. As Justice Powell explained in his concurring opinion in *Lewis v. City of New Orleans*, speech is less likely to rise to the level of fighting words when "addressed to a police officer trained to exercise a higher degree of restraint than the average citizen." 408 U.S. 913, 913 (1972) (Powell, J., concurring). Lower courts soon picked up that thread. *E.g.*, *Lamar v.*

---

[4] *See, e.g., Greene v. Barber*, 310 F.3d 889, 896 (6th Cir. 2002); *Commonwealth v. Hock*, 728 A.2d 943, 944, 947 (Pa. 1999); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990); *Cavazos v. State*, 455 N.E.2d 618, 619–20 (Ind. 1983).

[5] *See, e.g., Hock*, 728 A.2d at 944, 947; *Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997); *Duncan v. State*, 686 So.2d 1279, 1281–82 (Ala. Cr. App. 1996); *R.I.T. v. State*, 675 So.2d 97, 98–100 (Ala. Cr. App. 1995); *Ware v. City & County of Denver*, 182 Colo. 177, 177 (Colo. 1973).

Banks, 684 F.2d 714, 718 n. 13 (11th Cir. 1982); *City of Chicago v. Blakemore*, 305 N.E.2d 687, 689 (Ill. App. Ct. 1973).

The full United States Supreme Court later adopted that rationale in *Houston v. Hill*, 482 U.S. at 462. And lower courts have consistently held that line. *See, e.g.*, *Kennedy v. City of Villa Hills*, 635 F.3d 210, 216 (6th Cir. 2011); *Payne*, 337 F.3d at 776; *Poocha*, 259 F.3d at 1081.

Dissenting Justices of this Court acknowledged this application of fighting words to police officers in *Robinson*. Justice Cotter, joined by Chief Justice Gray, explained there is a presumption that police officers "should exercise restraint in the face of" expression like Robinson's because they are "trained [and] obligated" to "keep the peace." *Robinson*, ¶¶ 31–32 (Cotter, J., dissenting). Yet "it was [the officer]—not Robinson—who escalated the encounter" by getting out of his patrol car and challenging Robinson "to further conversation." *Id.* ¶ 30. Had the officer "let it go," the two men "would never have faced off on the street." *Id.* ¶ 30. "Instead of exercising restraint," the officer "went out of his way to confront Robinson," at which point, "and not before," the "prospect of an actual 'breach of the peace' arose." *Id.* ¶ 31. Justices Cotter and Gray were correct that Robinson's speech was constitutionally protected.

V. Even speech on the outer edges of the First Amendment must be protected to safeguard freedom of expression.

Eroding the outer edges of the First Amendment also has "an undoubted 'chilling' effect on speech relating to public figures that *does* have constitutional value." *Hustler*, 485 U.S. at 52 (emphasis added). It is tempting to permit censorship of speech one deems dispensable, but "First Amendment freedoms need breathing space to survive." *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1964); *see also Sible v. Lee Enters.*, 224 Mont. 163, 169, 729 P.2d 1271 (1986) (Hunt, J., concurring). Courts therefore "must give the benefit of any doubt to protecting rather than stifling speech." *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (opinion of Roberts, C.J.).

For example, "while false statements may be unprotected for their own sake, '[t]he First Amendment requires that we protect some falsehood in order to protect *speech that matters*.'" *BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 531 (2002) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)) (emphasis in original). Likewise here, tolerating "verbal tumult, discord, and even offensive utterance[s]" is a "necessary side effect[] of the broader enduring values which the process of open debate permits us to achieve." *Cohen*, 403 U.S. at 24–25.

Speakers may sometimes abuse the broad protection afforded to their speech, "[b]ut our Constitution says we must take this risk" because "this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

Therefore, even when viewed as a "distasteful abuse of a privilege," the fundamental right to free speech is still "truly implicated." *Cohen*, 403 U.S. at 24–25. The fact that police officers occasionally experience moments in which "the air [is] filled with verbal cacophony" is "not a sign of weakness but of strength." *Id*. Police officers "must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted).

"The fear is not that the most crass and boorish of the population is free to spew invectives to arouse anger in others, but that the government will use the tenuous grasp of the 'fighting words' exception to punish the content of the speech against those with whom the government

disagrees." *Woodmere v. Workman*, 2022-Ohio-71, ¶ 18, 183 N.E.3d 579 (Ohio Ct. App. 2022). "A law that can be directed against speech found offensive to some portion of the public," like Montana's disorderly conduct statute, "can be turned against minority and dissenting views to the detriment of all." *Matal*, 582 U.S. at 253–54 (Kennedy, J., concurring). The First Amendment "does not entrust that power to the government's benevolence." *Id.* at 254. Rather, "our reliance must be on the substantial safeguards of free and open discussion in a democratic society." *Id.* Overturning *Robinson* would serve that salutary admonition.

CONCLUSION

"Speech is powerful" and can "inflict great pain," but "we cannot react to that pain by punishing the speaker." *Snyder*, 562 U.S. at 460–61. "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate." *Id.*

Montanans must be free to criticize *even* those who protect them and *even* with opprobrious language. Robinson may not have been "a philosopher," and he "perhaps did not even possess the ability to comprehend how repellent his statements" were, but his expression was nevertheless protected by the First Amendment. *Johnson*, 491 U.S. at

421 (Kennedy, J., concurring). This Court should therefore expressly overrule *Robinson* and reverse the trial court's *Robinson*-based denial of Mayfield's motion to suppress evidence.

Respectfully submitted this 27th day of February, 2026.

/s/ *Alex Rate*

Alex Rate
AMERICAN CIVIL LIBERTIES
UNION OF MONTANA
P.O. Box 1968
Missoula, MT 59806
(406) 224-1447
ratea@aclumontana.org

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this *amici curiae* brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes; and the word count calculated by Microsoft Word for Windows is 4,992, excluding the Table of Contents, Table of Authorities, Certificate of Service, and Certificate of Compliance.

/s/ *Alex Rate*
Alex Rate

CERTIFICATE OF SERVICE

I, Alex Rate, hereby certify that I have served true and accurate copies of the foregoing Brief of *Amici Curiae* to the following on 02-27-2026:

Rebecca Dockter (Attorney)
316 N. Park Avenue
Helena MT 59601
Representing: Helena, City of
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders Helena MT 59620
Representing: Helena, City of
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO BOX 200147
Helena MT 59620
Representing: Matthew Gordon Mayfield
Service Method: eService

Electronically signed by Alex Rate
Dated: 02-27-2026

CERTIFICATE OF SERVICE

I, Alexander H. Rate, hereby certify that I have served true and accurate copies of the foregoing Brief - Amicus to the following on 02-27-2026:

Rebecca Dockter (Attorney)
316 N. Park Avenue
Helena MT 59601
Representing: Helena, City of
Service Method: eService

Dimitrios Tsolakidis (Attorney)
PO BOX 200147
HELENA MT 59620
Representing: Matthew Gordon Mayfield
Service Method: eService

Thad Nathan Tudor (Govt Attorney)
215 N SANDERS ST
HELENA MT 59601-4522
Representing: Helena, City of
Service Method: eService

Foundation for Individual Rights and Expression - FIRE (Amicus Curiae)
Jeffrey M. Murphy, ESQ
510 Walnut St
Suite 900
Philadelphia PA 19106
Service Method: Conventional

Electronically Signed By: Alexander H. Rate
Dated: 02-27-2026