

In the Wisconsin Court of Appeals

DISTRICT 1

MARY MACCUDDEN,
PLAINTIFF-RESPONDENT,

v.

KATY SCARLETT JOHNSON,
DEFENDANT-APPELLANT.

On Appeal from the Milwaukee County Circuit
Court, The Honorable Kristy Yang, Presiding,
Case No. 22CV6894

**OPENING BRIEF OF DEFENDANT-APPELLANT
KATY SCARLETT JOHNSON**

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ISSUES PRESENTED

1. Whether statements like “woke,” “god complex,” “white savior,” “woke lunatic,” and “bully” are capable of being proved false, and, in turn, are actionable as defamation?

The Circuit Court held yes.

2. Whether Johnson’s posts are protected by the First Amendment from a defamation trial?

The Circuit Court did not directly conduct a First Amendment analysis, even though Johnson raised it. R.57:13–23.

INTRODUCTION

This lawsuit involves a defamation claim for run-of-the-mill social media posts on X (formerly Twitter) and Facebook. The posts in question criticized a school district for having a “social justice coordinator,” and described people who hold such positions as “woke,” “white savior[s]” with a “god complex,” “woke lunatics,” and “bullies.” Statements like these are pervasive on social media; indeed, they were more restrained than a lot of online speech. Nevertheless, Plaintiff MacCudden, who previously held the position, chose to respond with a defamation lawsuit.

This case should have been promptly dismissed. It is well-established, black-letter law that, to be actionable for defamation, a statement must be “provably false.” *Milkovich v. Lorain J. Co.*, 497 U.S. 1, 20 (1990). That is, a comment must directly state or clearly imply an objective, binary truth claim that listeners would reasonably understand to be either true or false. Courts regularly hold that nebulous concepts like “woke” and “bully” that are routinely and indiscriminately thrown about in public discourse are not actionable precisely because their meaning depends on one’s opinion and viewpoint. The statements here fall squarely into the non-actionable, not-provably-false category.

Nevertheless, the Circuit Court denied both a motion to dismiss and a motion for summary judgment, and now intends to hold a trial on whether MacCudden really is “woke” or has a “god complex.” This is not only at odds with the law, it’s incoherent. How is one supposed to prove, at trial, whether MacCudden is “woke”?

Proceeding with this trial will subject Defendant Johnson to significant, unrecoverable expenses, and simultaneously violate her First Amendment rights. For this reason, “the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits,” and appellate courts have done so, in part, by reversing denials of

summary judgment. *E.g., Kahl v. Bureau of Nat’l Affs., Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017) (opinion by then-Judge Kavanaugh) (reversing a denial of summary judgment in this posture). The Wisconsin Supreme Court has likewise directed the Court of Appeals to give “careful consideration” to appeals in defamation cases where constitutional rights are implicated. *Lassa v. Rongstad*, 2006 WI 105, ¶¶ 88–89, 294 Wis. 2d 187, 718 N.W.2d 673. This Court should reverse the Circuit Court and direct the entry of summary judgment in Johnson’s favor.

ORAL ARGUMENT AND PUBLICATION

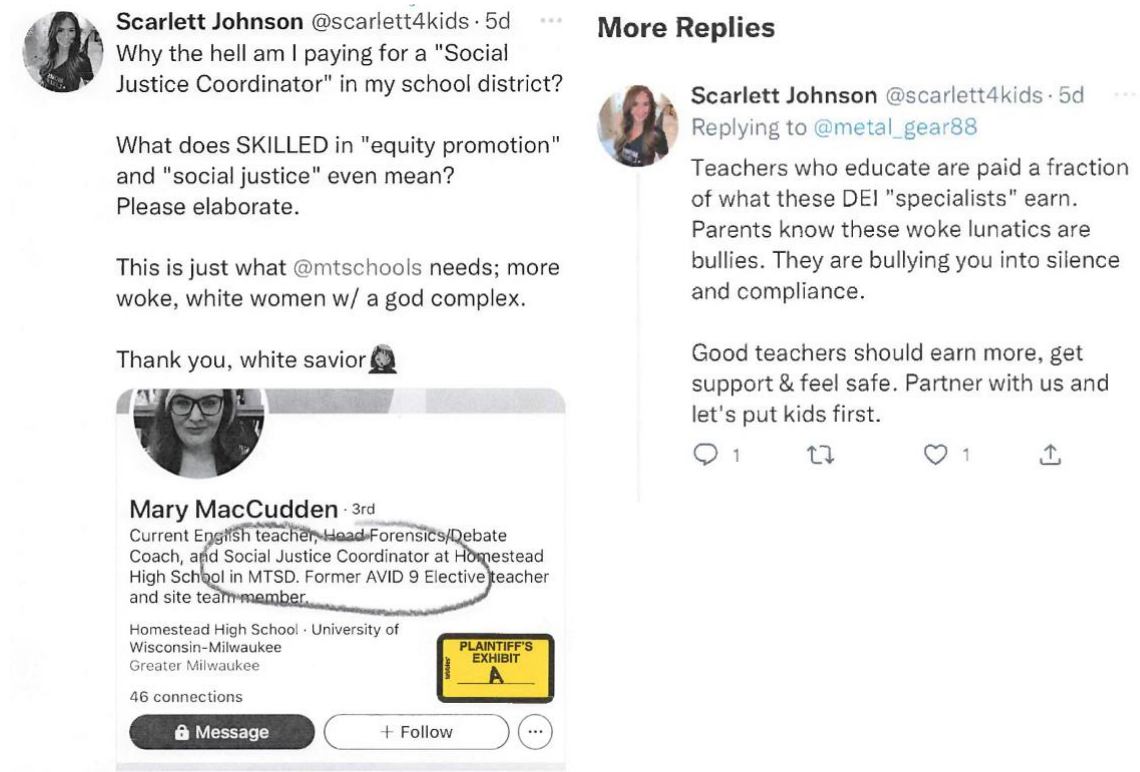
This case warrants publication to clarify the kinds of statements that are capable of defamatory meaning. Appellant does not request oral argument but would be more than happy to participate in an oral argument if it would aid this Court in resolving this appeal.

STATEMENT OF THE CASE

Plaintiff-Respondent Mary MacCudden was an English teacher and “social justice coordinator” at the Mequon-Thiensville School District, until June 2022. R.57 ¶¶ 5, 8; R.64:3–4 (not disputing these proposed findings of fact); R.59:6–10. Her public LinkedIn profile stated, among other things, that she was a “Social Justice Coordinator at Homestead High School in MTSD [the Mequon-Thiensville School District].” R.23, Ex. A. MacCudden left that position in June 2022, but did not update her LinkedIn profile—it continued to represent that this was her “current” position until July 2023. R.57 ¶ 9; R.64:3–4 (not disputing this fact).

Defendant-Appellant Scarlett Johnson is a mother and resident in the Mequon-Thiensville School District. She also has an active social media presence. In October 2022, she discovered MacCudden’s profile on LinkedIn and posted on X and Facebook about it, criticizing her school district for having and paying for a “social justice coordinator.”

Screenshots of Johnson's two social media posts that are at issue in this case and appeal are below (and at R.23, Ex. A, D)¹:



Just a few weeks later, MacCudden responded to these posts by filing a defamation lawsuit against Johnson. R.2.

The Circuit Court denied Johnson's motion to dismiss on July 7, 2023, R.35, and then partially denied Johnson's motion for summary judgment on April 22, 2024. App. 3–13; R.70. The latter order is the subject of this appeal. In both motions, Johnson argued that her posts are statements of opinion that are not provably false and therefore not

¹ The posts that the Circuit Court allowed to proceed to trial are contained in these two screenshots. The other posts attached to the complaint are no longer relevant for purposes of this appeal.

actionable as defamation, and that her speech is protected by the First Amendment. R.26, 57.

The Circuit Court held that some portions of Johnson’s statements are not actionable because they were substantially true: MacCudden did work as a social justice coordinator at Homestead High School, the school district did pay for a social justice coordinator, and MacCudden is a (mostly) white woman. App. 7–9.

But the Circuit Court held that other portions of Johnson’s posts—in particular, the phrases “woke,” “god complex,” “white savior,” “woke lunatics,” and “bullies”—*are* actionable for defamation because, in the Circuit Court’s view, they are “mixed opinions” that “impl[y] the allegation of undisclosed defamatory facts,” namely that MacCudden “abuses her position of power over students” and is “unfit[] to teach.” App. 11–12.

The Circuit Court issued its summary judgment decision on April 22, 2024. Johnson timely filed a petition for permissive appeal on May 6, which this Court granted on May 30.

STANDARD OF REVIEW

Whether a statement is capable of defamatory meaning is a question of law that this Court reviews de novo. *E.g.*, *Laughland v. Beckett*, 2015 WI App 70, ¶ 21, 365 Wis. 2d 148, 870 N.W.2d 466.

When conducting this review, the statements in question must be evaluated “reasonably,” as they would have been understood by “the ordinary mind,” and courts must consider “whether the meaning ascribed by [the] plaintiff[] is a natural and proper one.” *Id.* ¶ 21 (quoting *Bauer v. Murphy*, 191 Wis. 2d 517, 523, 530 N.W.2d 1 (Ct. App. 1995)); *Terry v. J. Broad. Corp.*, 2013 WI App 130, ¶ 19, 351 Wis. 2d 479, 840

N.W.2d 255 (“[T]he words ... must be construed in the plain and popular sense in which they would naturally be understood.”).

And the whole context matters. There is no room for cherry picking and artful interpretation, no “dissect[ing] the alleged defamatory statement[s] ... and thus los[ing] the vital over-all meaning.” *Frinzi v. Hanson*, 30 Wis. 2d 271, 277, 140 N.W.2d 259, 262 (1966) (citing *Schoenfeld v. J. Co.*, 204 Wis. 132, 235 N.W. 442 (1931)) (affirming dismissal after whole-record review); *Terry*, 2013 WI App 130, ¶ 19. Courts are limited by how “a person of average intelligence, reading [*an*] entire article, would ... naturally understand” it. *Schoenfeld*, 235 N.W. at 445 (emphasis added).

Finally, and critically, given the serious First Amendment implications, appellate courts reviewing defamation cases have “an obligation to ‘make an independent examination of the whole record’ in order to make sure ‘that the judgment does not constitute a forbidden intrusion on the field of free expression.’” *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 672, 543 N.W.2d 522 (Ct. App. 1995) (quoting *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 499 (1984)).

ARGUMENT

I. Johnson’s Posts Are Not Actionable as Defamation.

A. Statements Must Be Provably True or False to Be Actionable; Subjective Opinions and Rhetorical Hyperbole Generally Don’t Qualify.

Wisconsin courts, the United States Supreme Court, the Seventh Circuit, and courts all around the country have long recognized that, to be actionable as defamation, a statement must be “provably false”—i.e., “sufficiently factual to be susceptible of being proved true or false.” *See, e.g., Milkovich*, 497 U.S. at 20–21; *Terry*, 2013 WI App 130, ¶ 23 (quoting *Milkovich* for this proposition);

Torgerson v. J./Sentinel, Inc., 210 Wis. 2d 524, ¶ 19, 563 N.W.2d 472 (1997) (“If the challenged statements as a whole are not capable of a false [] meaning ... a libel action will fail.”); *L. Offs. of David Freydin, P.C. v. Chamara*, 24 F.4th 1122, 1130 (7th Cir. 2022) (“[N]one of the statements can be objectively verified as true or false”).

“Loose, figurative, or hyperbolic language,” even “vigorous epithet[s],” do not count. *Milkovich*, 497 U.S. at 17, 21; *Greenbelt Coop. Publi’g Ass’n v. Bresler*, 398 U.S. 6, 14 (1970). It’s easy to see why: “[t]he vaguer a term, or the more meanings [the term] reasonably can convey, the less likely it is to be verifiable and hence actionable.” *Richards v. Union Leader Corp.*, No. 2022-0197, 2024 WL 4031395, at *5 (N.H. Sept. 4, 2024) (citations omitted). Thus, across jurisdictions, hyperbole and insults are generally “too vague to be falsifiable.” *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996).

Indeed, “[t]he common law has always differentiated sharply between genuinely defamatory communications as opposed to obscenities, vulgarities, insults, epithets, name-calling, and other verbal abuse.” Rodney A. Smolla, *Law of Defamation*, § 4:7 (2d ed. 1999). “Such statements may be hurtful to the listener and are to be discouraged, but ... are not actionable ... no matter how obnoxious, insulting, or tasteless.” *Id.* If a statement “is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.” *L. Offs. of David Freydin*, 24 F.4th at 1129–30.

“[A]ccusations[s] of concrete, wrongful *conduct* are actionable,” but “general statements” about wrongful *ideas* or *values*, like “being racist, unfair, or unjust are not.” *La Liberte v. Reid*, 966 F.3d 79, 93 (2d Cir. 2020) (citation omitted) (emphasis added) (cleaned up). If you call someone “a ‘rat,’ you are not saying something definite enough to allow a jury to determine whether what you are saying is true or false.” *Dilworth*, 75 F.3d at 309. Sending “a vague or imprecise

statement” to a jury opens defendants up to liability for tendentious, egg-shell readings of their statements, based on “fourth-ranked dictionary definitions,” and is impermissible. *See Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir. 1986).

In *Stevens v. Tillman*, 855 F.2d 394, 402 (7th Cir. 1988), for example, Judge Easterbrook explained that calling someone a “racist” is the kind of statement that is generally “not actionable” because “[t]he word has been watered down by overuse, becoming common coin in political discourse,” and therefore it lacks a precise enough meaning to be capable of being proved false (giving examples for how it is used). Given that the word “is hurled about so indiscriminately[,] [] it is no more than a verbal slap in the face; the target can slap back.” *Id.*

There are hundreds, if not thousands, of cases holding that generalized insults, names, and criticisms are not actionable for defamation because they are not provably true or false. A small sampling of examples include:

- “scam,” “rip[] off,” and “cheat” - *Terry*, 2013 WI App 130, ¶ 23
- “racist” - *Stevens*, 855 F.2d at 402
- “a bully,” “ignorant,” “ill-tempered,” “buffoon,” “sub-standard human,” “right-wing fanatic,” “one of the worst judges in the United States” - *Standing Comm. on Discipline of U.S. Dist. Ct. for Cent. Dist. of Cal. v. Yagman*, 55 F.3d 1430, 1440 (9th Cir. 1995)
- “mentally imbalanced,” “nuts,” “crazy,” and “Looney Tunes” - *Lieberman v. Fieger*, 338 F.3d 1076, 1080 (9th Cir. 2003)
- “traitor” and “scab” - *Old Dominion Branch No. 496, Nat. Ass’n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 282–84 (1974)
- “hypocrite,” “chauvinist,” “racist,” “terrible experience,” and “awful customer service” - *L. Offs. of David Freydin*, 24 F.4th at 1130–31

- “cancer quacks,” “con-artists,” “phony cures,” “unscrupulous charlatans victimizing cancer patients,” and the like - *Spelson v. CBS, Inc.*, 581 F. Supp. 1195, 1199 (N.D. Ill. 1984), *aff’d*, 757 F.2d 1291 (7th Cir. 1985)
- “unsatisfactory” and “not competent” (regarding work performance) - *Protic v. Dengler*, 46 F. Supp. 2d 277, 281 (S.D.N.Y.), *aff’d*, 205 F.3d 1324 (2d Cir. 1999)
- “2-bit thief and counterfeiter” - *Brahms v. Carver*, 33 F. Supp. 3d 192, 200 (E.D.N.Y. 2014)
- “crony capitalist,” “crook,” and “crooked owner” - *McGlothlin v. Hennelly*, 370 F. Supp. 3d 603, 618 (D.S.C. 2019)

By contrast, the kinds of statements that are actionable for defamation are *specific* and falsifiable allegations of “serious misconduct” like “plagiarism, sexual harassment, or selling high grades.” *Dilworth*, 75 F.3d at 310 (emphasis added) (cleaned up) (affirming dismissal where the defendant called an engineer a “crank”). Other examples include a “charge of patent infringement,” allegations of the “commission of a criminal act,” “misappropriat[ion] of confidential information,” or “theft of trade secrets”—all of which are specific, well-defined, and verifiable (or falsifiable). *Converters Equip. Corp. v. Condes Corp.*, 80 Wis. 2d 257, 263, 258 N.W.2d 712 (1977). While allegations about specific conduct are actionable, general attacks on someone’s ideas or philosophy aren’t. As one court put it, Americans are free to go online and “ruminat[e] on education and race” (or any other topic). *Cummings v. City of New York*, No. 19-CV-7723, 2020 WL 882335 *23–24 (S.D.N.Y. Feb. 24, 2020) (dismissing a defamation case even where a blogger called out a teacher in extraordinary detail).

B. None of Johnson’s Statements Are Provably False.

Johnson’s statements all fall well within the realm of subjective statements of opinion or rhetorical hyperbole that are not provably false and therefore are not actionable for defamation.

As an initial matter, Johnson’s statements were not even about MacCudden directly, but instead were more generally about the kind of people who hold “social justice coordinator” positions. Johnson was primarily objecting to the fact that her school district had and paid for a social justice coordinator. She then commented that, in her opinion, people who hold these positions *tend to be* “woke,” have a “god complex,” and view themselves as “white saviors.” This is clear from the full context of her post. She did not say, “Mary MacCudden has a god complex,” or anything like that. She said, “This is just what @mtschools needs; more woke, white women w/ a god complex”—i.e., this is generally the type of person who holds this position. *Supra* p. 7. Likewise, her follow-up comments about “woke lunatics” and “bullies” were not specifically directed at MacCudden; she was speaking generally to express her view about the kinds of people who hold these positions. Note Johnson’s use of the plural in her post: “Teachers who educate are paid a fraction of what *these* DEI ‘specialists’ earn. Parents know *these* woke lunatics are bullies.” *Supra* p. 7 (emphases added).

As noted above, statements must be interpreted “reasonably,” as they would have been understood by “the ordinary mind,” and within the full context in which they were made. *Laughland*, 2015 WI App 70, ¶ 21. In context, then, the question is whether the assertion that “social justice coordinators” are often “woke” “lunatics” and “bullies” with a “god complex” is provably true or false. It clearly is not. It is a statement of opinion that Johnson is entitled to hold and to express publicly.

Even if her statements are treated as if they were about MacCudden specifically—and, again, that would not be a reasonable interpretation—they are all still statements of opinion that are not provably true or false.

1. Bully. Courts consistently hold that “bully” is not provably true or false. As the D.C. Circuit put it, “merely calling someone a bully is

simply ‘imaginative expression’” and a “subjective descriptor[]” that cannot be “proven, or disproven, to a jury.” *Couch v. Verizon Commc’ns Inc.*, 105 F.4th 425, 435 (D.C. Cir. 2024) (quoting *Milkovich*, 497 U.S. at 17). Or, as the Ninth Circuit held, the word “bully” is “rhetorical hyperbole, incapable of being proved true or false.” *Yagman*, 55 F.3d at 1440 (9th Cir. 1995). Many other state supreme courts and federal district courts have held the same. *E.g.*, *Hupp v. Sasser*, 200 W. Va. 791, 798, 490 S.E.2d 880 (W.V. 1997) (“Dean Sasser’s opinion that Mr. Hupp is a bully is not [provably] false as that conclusion is totally subjective.”); *Dodson v. Dicker*, 306 Ark. 108, 110, 812 S.W.2d 97 (1991) (“bully” held not “an assertion of objective facts”); *Edwards v. Schwartz*, 378 F. Supp. 3d 468, 517 (W.D. Va. 2019) (“[W]hat one person may perceive as bullying, another may describe as assertiveness.”); *Shipyard Brewing Co., LLC v. Logboat Brewing Co.*, No. 2:17-CV-04079-NKL, 2017 WL 6733971, at *4 (W.D. Mo. Dec. 29, 2017) (“[T]he phrase “trademark bully” is an imprecise description or subjective assessment ... and cannot be proven as an objective fact.”); *Taylor v. CNA Corp.*, 782 F. Supp. 2d 182, 202 and n. 12 (E.D. Va. 2010); *Purcell v. Ewing*, 560 F. Supp. 2d 337, 344 (M.D. Pa. 2008).

For “bully” to be actionable, a defendant needs to allege “specific acts of harassment” that carry “factual connotations that can be proven, or disproven, to a jury.” *Couch*, 105 F.4th at 435. Without “alleg[ing] specific ... actions” or “identify[ing] discrete victims,” *Purcell*, 560 F. Supp. 2d at 344, calling a “public school teacher ... a ‘bully’ is an opinion and not actionable as defamation,” *Bartnicki v. Scranton Sch. Dist.*, No. 21-2360, 2022 WL 4243953, at *1–2 (3d Cir. 2022) (cleaned up) (affirming dismissal). Here, Johnson did not allege any specific act of harassment or abuse, nor did she identify any victim (student or otherwise), or anything else objective about MacCudden’s work that could be proved or disproved at trial. Even if Johnson had pointed right at MacCudden and called her a “bully,” that would not be actionable.

2. Lunatic. Likewise, calling somebody “insane” or a “lunatic” constitutes “loose, figurative language that expresses opinion ... not factual allegation.” *Thomas v. News World Commc’ns*, 681 F. Supp. 55, 64 (D.D.C. 1988); *Steinhausen v. HomeServices of Neb., Inc.*, 289 Neb. 927, 941–42, 857 N.W.2d 816 (Neb. 2015) (collecting cases and listing many different variations). Again, courts consistently hold that names like these are not actionable for defamation. *E.g.*, *Lieberman*, 338 F.3d 1076, 1080 (“mentally imbalanced,” “nuts,” “crazy,” and “Looney Tunes” not actionable); *DeMoya v. Walsh*, 441 So.2d 1120, 1120 (Fla. Dist. Ct. App. 1983) (“raving maniac” not actionable); *Lapine v. Seinfeld*, 31 Misc. 3d 736, 752–54, 918 N.Y.S.2d 313 (N.Y. Sup. Ct. 2011) (“wacko, nut job, hysterical” not actionable); *Stepien v. Franklin*, 39 Ohio App. 3d 47, 528 N.E.2d 1324, 1327, 1329 (Ohio Ct. App. 1988) (“crazy,” “nuts,” “lunatic,” and “irrational” not actionable). Courts have even found the label “lunatic” not to be actionable when related to job performance. *E.g.*, *Lieberman*, 338 F.3d 1076, 1080; *Davis v. New Penn Fin., LLC*, No. 6:18-CV-3342, 2021 WL 3088059, at *11–12 (D. S.C. July 22, 2021) (statement that “nobody would hire her because she is a lunatic” was “either too vague or protected hyperbole or opinion.”).

Again, Johnson did not directly call MacCudden a “lunatic.” She remarked on “these woke lunatics” *in general*. But even if Johnson had pointed right at MacCudden, called her a “lunatic,” and told the world not to hire her, this is still too vague to be actionable for defamation.

3. God Complex. To Johnson’s knowledge, only one court has considered whether the phrase “god complex” is capable of a defamatory meaning, and, as one would expect, the court held that “[a] reasonable trier of fact could not conclude that” this phrase is a “statement[] of fact.” *Ibarra v. Carpinello*, No. B220934, 2011 WL 925719, at *7 (Cal. Ct. App. Mar. 18, 2011), as modified (Mar. 23, 2011) (cleaned up). The phrase simply does not have a clear meaning or definition. Merriam Webster,

for example, does not even have an entry for the phrase.² Wikipedia lists a few different ways the phrase has been used, while noting that it “is not a clinical term nor diagnosable disorder and does not appear in the Diagnostic and Statistical Manual of Mental Disorders (DSM).”³ Indeed, even MacCudden herself had trouble defining the phrase during her deposition. See MacCudden Dep. (R.60, Ex. K-A) at 60:2–12 (“I took the term ‘god complex’ to be an assumption of my mental state *and* of my views and opinions towards others *and* in how I conduct myself.”) (emphases added). The phrase is a vague and unverifiable term that Americans are free to throw around in public discourse.

4. Woke and White Savior. “Woke” and “white savior” are even more difficult to define. Indeed, these phrases were not even used until recently in political discourse. And there is no agreement on what they mean, much less an *objectively verifiable* truth claim that could be tried before a jury. A recent USA Today poll, for example, found that Americans don’t even agree on “whether ‘woke’ is a compliment or an insult.”⁴ According to the poll, most Democrats define it as “being informed, educated on, and aware of social issues,” while most Republicans use it to mean “being overly politically correct and policing others’ words.” *Id.* To give just another quick example, ABC News recently published a piece entitled, “What does ‘woke’ mean and why are some conservatives using it?” and the byline and first sentence note that

² See <https://www.merriam-webster.com/dictionary/%22god%20complex%22>

³ “God complex,” Wikipedia (last visited Oct. 9, 2024), https://en.wikipedia.org/wiki/God_complex.

⁴ *Americans divided on whether “woke” is a compliment or insult*, Ipsos (Mar. 8, 2023), <https://www.ipsos.com/en-us/americans-divided-whether-woke-compliment-or-insult>.

“[t]he definition of ‘woke’ changes depending on who you ask.”⁵ Again, even MacCudden acknowledged the duality of the term. MacCudden Dep. (R.60, Ex. K-A) at 55:8–56:10 (“I believe that the word ‘woke’ has had multiple definitions over the last, give or take, seven years.”)

The phrase “white savior” is even harder to define or pin down.⁶ Yet again, even MacCudden had trouble defining the phrase and admitted that it depends in part on “subjective intentions.” MacCudden Dep. (R.60, Ex. K-A) at 61:14–63:12 (“White savior, I would define as a white-identifying individual who believes that they can—I can’t use hand gestures—that they can save those of more racially and ethnically oppressed groups through their actions. However, there is a negative connotation attributed to the term ‘white savior’ as those actions are done disregarding the perspective of the individuals they are trying to save.”)

Unsurprisingly, Johnson was unable to find any cases analyzing either of these phrases in the context of a defamation claim. Nevertheless, what *is* clear is that neither phrase is “definite enough to allow a jury to determine whether what [Johnson said] is true or false.” *Dilworth*, 75 F.3d at 309.

As the analysis above shows, when taken separately, every one of Johnson’s terms is “too vague to be falsifiable.” *Id.* at 309. Considering the statements strung together, it becomes even more obvious Ms. Johnson’s message was vague and hyperbolic. Courts regularly hold that a “string of colorful adjectives” is just “rhetorical hyperbole, incapable of

⁵ Kiara Alfonseca, *What does ‘woke’ mean and why are some conservatives using it*, ABC News (Jan. 23, 2024), <https://abcnews.go.com/Politics/woke-conservatives/story?id=93051138>.

⁶ *White savior*, Wikipedia (last visited Oct. 9, 2024) (giving various examples of how the phrase has been used), https://en.wikipedia.org/wiki/White_savior.

being proved true or false.” *Yagman*, 55 F.3d at 1440. In the case just cited, for example, the defendant called a judge “dishonest,” “ignorant,” “ill-tempered,” “buffoon,” “sub-standard human,” “right-wing fanatic,” “a bully,” “and one of the worst judges in the United States.” *Id.* These were not actionable because they “convey[ed] nothing more substantive than Yagman’s contempt for Judge Keller.” *Id.*; see also *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264, 286 (1974). Likewise, Johnson’s statements, taken together, simply express the force of her opinion. Johnson is entitled to summary judgment.

C. The Circuit Court Was Wrong for Multiple Reasons.

It is true that a statement framed as an opinion can sometimes be actionable, but “*only if* it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *Terry v. J. Broad. Corp.*, 2013 WI App 130, ¶ 14, 351 Wis. 2d 479, 498, 840 N.W.2d 255, 263 (incorporating the Restatement (Second) of Torts § 566) (cleaned up). Courts sometimes call these “mixed opinions.” *E.g.*, R.70:9 (citing *Terry*, 2013 WI App 130, ¶ 14).

The Circuit Court wrongly held that Johnson’s statements were “mixed opinions” that “impl[y] the allegation of undisclosed defamatory facts,” namely that MacCudden “abuses her position of power over students” and is “unfit[] to teach.” App. 11–12. This holding is deeply misguided, for multiple independently sufficient reasons.

First, Johnson’s posts do not remotely imply to the reader that she is asserting MacCudden “abuses her position of power over students” or is “unfit[] to teach.” *Id.* As noted above, Wisconsin courts have long held that statements must be evaluated “reasonably,” as they would have been understood by “the ordinary mind,” and courts must consider “whether the meaning ascribed by [the] plaintiff[] is a natural and proper one.” *Laughland*, 2015 WI App 70, ¶ 21; *Terry*, 2013 WI App 130,

¶ 19 (“[T]he words ... must be construed in the plain and popular sense in which they would naturally be understood.”). The full “context” of the statements matters. *Terry*, 2013 WI App 130, ¶ 19. “[N]o innuendo can alter the sense or supply by innuendo a meaning which is not there.” *Luthey v. Kronschnabl*, 239 Wis. 375, 380, 1 N.W.2d 799, 801 (1942). Words must be given their “ordinary and natural meaning.” *Id.* And this is ultimately a question of law for the courts, not for a jury. *Laughland*, 2015 WI App 70, ¶ 21.

No reasonable person reading Johnson’s posts would have understood her to be implicitly accusing MacCudden of “abus[ing] her position of power over students,” or asserting that she is “unfit to teach.” App. 11–12. Johnson was criticizing her school district for *having* a social justice coordinator and justifying her opinion with generalizations. She clearly was not commenting on MacCudden’s teaching record or qualifications. Johnson never indicated she had any personal experience with MacCudden or was basing her statements on anything other than what she disclosed on her LinkedIn profile.

Second, and perhaps more fundamentally, even if Johnson’s posts could reasonably be understood as implying that MacCudden is “unfit to teach” or “abuses her power,” any such implication is *itself* an opinion that is not capable of being proved false. In other words, while a statement of opinion can sometimes be defamatory if it implies a false statement of fact, the thing that it *implies* must be provably false. *Milkovich* illustrates the point. The statements that the Court considered there implied a very specific and provably false assertion: that the plaintiff had “perjured himself in a judicial proceeding.” *Milkovich*, 497 U.S. at 21. The Court explained that “the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false,” but contrasted this with “the sort of loose, figurative, or hyperbolic language which would negate the impression

that the writer was seriously maintaining that petitioner committed the crime of perjury.” *Id.* Perjury is a precise concept that everyone understands, and which is either true or false—the plaintiff either lied during a judicial proceeding or he didn’t.

Laughland v. Beckett, 2015 WI App 70, 365 Wis. 2d 148, 870 N.W.2d 466, on which the Circuit Court heavily relied, is of a piece. Like in *Milkovich*, the defendant made a variety of statements that both explicitly and implicitly accused the plaintiff of having “defrauded banks” and “manipulat[ed] banks and credit card companies.” *Id.* ¶¶ 24, 28. The claim that the defendant had “engaged in financial fraudulent activity” was a “specific allegation” with an “underlying (and unsubstantiated) factual assertion” that was capable of being proved true or false. *Id.* ¶ 28. Either the plaintiff engaged in fraud or he didn’t. The Court contrasted this “specific” allegation with the ambiguous statements that the plaintiff was a “low life loser,” which, the Court rightfully implied, would not be actionable without more. *Id.*

In stark contrast to both *Milkovich* and *Laughland*, the idea that someone is “woke” or a “bully,” or even “unfit to teach” or “abuses power” is nebulous and in the eye of the beholder. One might believe that a person is “unfit to teach” because of their qualifications, or their demeanor, or the way they teach, or their beliefs about the role of a teacher and what one should be teaching. Likewise, one can believe that it is an “abuse of power” to teach certain viewpoints to minors, or to teach concepts in a certain way, or even just to believe that any one person should be in charge of defining and “coordinating” “social justice.” Many actions by a teacher could be viewed by one person as an “abuse” and another as completely appropriate. Many qualities of a teacher could be viewed by one person as “unfitness” and another as beneficial. Both concepts are purely subjective opinions depending on the listener’s viewpoint, not objective facts. Given the variety of ways that one could

understand these concepts, how are the parties to prove, at trial, whether MacCudden is “unfit to teach” or “abuses power”? Again, Johnson did not say or imply either thing, but even if she had, she is entitled to have and to express those opinions.

Indeed, other courts have rejected defamation claims for exactly this reason where the defendant *actually* said the very kinds of things that the Circuit Court wrongly thought Johnson had implied. In *Gibson v. Boy Scouts of Am.*, 360 F. Supp. 2d 776, 781 (E.D. Va. 2005), the statement in question was that the plaintiff was “unfit to be a Scoutmaster and in Scouts.” The Court held that this “does not contain a provably false factual connotation,” but instead is “merely the expression of the speaker’s opinion.” *Id.* The Fourth Circuit affirmed for the same reasons. 163 F. App’x 206, 212–13 (4th Cir. 2006); *see also Leone v. Rosenwach*, 245 A.D.2d 343, 665 N.Y.S.2d 594 (N.Y. App. Div. 1997) (calling someone “an incompetent worker” and “unfit for his job” were “nonactionable statements of opinion, as they ‘were indefinite, ambiguous and incapable of being objectively characterized as true or false.’”) (citations ommitted); *Stanley v. Carrier Mills-Stonefront Sch. Dist. No. 2*, 459 F. Supp. 2d 766, 775 (S.D. Ill. 2006) (calling someone an “unfit parent” was “too amorphous and general to be objectively verifiable”).

In the same way, “abuse” is too amorphous to be actionable. Courts routinely strike or dismiss the term, describing “abuse” (without more) as “hyperbolic” and “figurative,” *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 877 (W.D. Va. 2016), a “vague exaggeration,” *Saint David’s Sch. v. Hume*, 101 A.D.3d 582, 583, 957 N.Y.S.2d 52 (N.Y. App. 2012), and the kind of “‘loose, figurative or hyperbolic language’ that is constitutionally protected opinion,” *DRT Const. Co. v. Lenkei*, 176 A.D.2d 1229, 576 N.Y.S.2d 724 (N.Y. App. 1991) (quoting *Milkovich*, 497 U.S. at 17) (considering the phrase “profit hungry land abusers”). The

Eramo court, before sending other parts of a mishandled Rolling Stone article to trial, still singled out and struck from consideration the phrase “a whole new kind of abuse” because it was “just too subjective ... to be proved false.” 209 F. Supp. 3d at 877 (citations omitted). One court even found that the phrase “lawsuit abuse” was so obviously non-actionable that a defamation suit predicated on it was sanctionable. *Falk & Mayfield, L.L.P. v. Molzan*, 974 S.W.2d 821, 824 (Tex. App. 1998) (affirming punitive sanctions because the phrase “is an individual judgment that rests solely in the eye of the beholder” and “does not, in its common usage, convey a verifiable fact”) (cleaned up).

Again, Johnson never actually said or implied that MacCudden was “unfit to teach” or that she “abuses her power.” But these cases show that, even if she had, her statements still would not be actionable for defamation.

II. Johnson’s Posts Are Protected Speech; A Defamation Trial Would Violate Her First Amendment Rights.

The Supreme Court has long held that the First Amendment places limits on state defamation law. *E.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Milkovich*, 497 U.S. at 14–22 (surveying cases and various limits). Indeed, defamation cases must be reviewed “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times*, 376 U.S. at 270 (1964). After all, “nothing in life or our law guarantees a person immunity from occasional sharp criticism, and no person avoids a few linguistic slings and arrows, many demonstrably unfair.” *Favre v. Sharpe*, No. 23-60610, 2024 WL 4196552, at *3 (5th Cir. Sept. 16, 2024) (citations omitted). Wisconsin courts have repeatedly emphasized the same. *Torgerson*, 210 Wis. 2d 524, ¶¶ 27–31;

Lassa, 2006 WI 105, ¶ 88 (cautioning that “defamation cases ... may raise serious constitutional questions”); *Terry*, 2013 WI App 130, ¶ 14.

Milkovich articulated two constitutional limits on defamation claims that are especially relevant here. First, “a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection.” 497 U.S. at 20. The Supreme Court has often said that speech on matters of public concern is “at the heart of the First Amendment’s protection.” *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (citations omitted). And commentary on the operation of public schools—in particular, “how funds ... should be spent”—is obviously of “vital” public concern. *Pickering v. Board of Education*, 391 U.S. 563, 571–72 (1968)). Likewise, the “misuse of public funds, wastefulness, and inefficiency in managing and operating government entities” are “well-recognized” subjects of public concern. *Burkes v. Klauser*, 185 Wis. 2d 308, 339, 517 N.W.2d 503 (1994) (listing cases).

Second, and relatedly, the First Amendment also fully protects “statements that cannot ‘reasonably be interpreted as stating actual facts’ about an individual.” *Milkovich*, 487 U.S. at 2. These two limits “provide[] assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” *Id.* at 20.

Finally, the Supreme Court has recognized that “social media in particular” is now one of “the most important places ... for the exchange of views.” *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). It is the “modern public square.” *Id.* at 107; *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2422–23 (2024) (Alito, J., concurring in the judgment).

In light of the First Amendment implications, “the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation

suits,” and appellate courts have done so, in part, by reversing denials of summary judgment on interlocutory appeals. *E.g.*, *Kahl v. Bureau of Nat’l Affs., Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017) (opinion by then-Judge Kavanaugh). That is because, if the speech is protected, “there should be no trial at all.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975). Or, as Justice Alito put it recently, “requiring a free speech claimant to undergo a trial after a decision that may be constitutionally flawed is no small burden.” *National Review, Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari) (citing *Cox*). A defendant “who prevails after trial in a defamation case will still have been required to shoulder all the burdens of difficult litigation and may be faced with hefty attorney’s fees,” and “[t]hose prospects may deter the uninhibited expression of views that would contribute to healthy public debate.” *Id.*; *Torgerson*, 210 Wis. 2d 524, ¶ 29 (“Summary judgment may be particularly appropriate in defamation actions in order to mitigate the potential ‘chilling effect’ on free speech and the press that might result from lengthy and expensive litigation.”) (citations omitted); *Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 672, 543 N.W.2d 522 (Ct. App. 1995).

Johnson’s social media posts were directed, primarily, at criticizing her school district for “paying for” a social justice coordinator. Her post begins: “Why the hell am I paying for a ‘Social Justice Coordinator’ in my school district?” R.23, Ex. A. As just noted, how a school district spends its funds is a subject that both the United States Supreme Court and the Wisconsin Supreme Court have recognized is of “vital” public importance, at the “heart” of the First Amendment. *Pickering*, 391 U.S. at 571–72; *Burkes*, 185 Wis. 2d at 339; *Dun & Bradstreet, Inc.*, 472 U.S. at 759.

The rest of Johnson’s commentary was directed at “social justice coordinators” *generally*. She added, “[t]his is just what @mtschools

needs; more woke, white women, w/ a god complex. Thank you, white savior.” R.23, Ex. A. She later added in a comment, “Teachers who educate are paid a fraction of what *these* DEI ‘specialists’ earn. Parents know *these* woke lunatics are bullies.” *Id.*, Ex. D (emphasis added). Johnson’s statements clearly express her opinion about a category of people who are likely to occupy this kind of position. In her view, people who hold these types of positions tend to be “woke,” “lunatics,” “bullies,” have a “god complex,” and view themselves as “white saviors.” This is exactly the kind of “imaginative expression” and “rhetorical hyperbole” that has “traditionally added much to the discourse of our Nation,” and that is entitled to robust First Amendment protection. *Milkovich v. Lorain J. Co.*, 497 U.S. at 20; e.g., *Richards v. Union Leader Corp.*, 2024 N.H. 49, 2024 WL 4031395 (N.H. Sept. 4, 2024) (affirming dismissal of a defamation claim for calling someone a “racist” and “white supremacist”).

Even if Johnson had “singled out MacCudden” and was making these statements about her directly, App. 12—and no reasonable reader of her posts would understand them that way—her speech is still entitled to the highest First Amendment protection. Johnson neither said nor implied anything provably false about MacCudden. Put differently, none of her statements could “reasonably have been interpreted as stating actual facts about the public figure involved.” *Milkovich*, 497 U.S. at 17 (citation omitted). “[E]ven the most careless reader [would] have perceived that [her] word[s] w[ere] no more than rhetorical hyperbole [or] vigorous epithet[s].” *Id.* She expressed her opinions. And opinions, about politics, people, or the flying spaghetti monster—when they contain no provably false assertions—are protected. *See Milkovich*, 497 U.S. at 20; *see also Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1303 (8th Cir. 1986) (“[N]o opinion is actionable, whether it concerns a private person or a public figure.”) (emphasis in original).

As the case law demonstrates, MacCudden cannot advance her ideology, advertise her services on LinkedIn, R.23, Ex. A, and then play the victim in a defamation action, muzzling critics. But that is precisely what the Circuit Court’s decision, left uncorrected, will do: grant MacCudden “license ... to fight freestyle, while requiring [Johnson] to follow Marquis of Queensberry rules.” *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992). Moreover, a bad ruling here will simply encourage conservatives to retaliate with their own Hatfield–McCoy defamation actions. These actions intimidate and chill all Wisconsin parents, who have a strong interest in debating education openly. Summary judgment is therefore “particularly appropriate.” *See Torgerson*, 210 Wis. 2d 524, ¶ 29.

The Circuit Court failed to conduct any First Amendment analysis at all. *See generally*, App. 6–13. This Court should clarify that the First Amendment limits defamation actions in Wisconsin and that Johnson’s speech is protected.

CONCLUSION

This Court should reverse the decision of the Circuit Court and direct the entry of summary judgment in Johnson’s favor.

Dated: October 15, 2024.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 6,630 words.

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