No. _____

In the Wisconsin Court of Appeals

DISTRICT 1

KATY SCARLETT JOHNSON,
DEFENDANT-PETITIONER,

v.

MARY MACCUDDEN,
PLAINTIFF-RESPONDENT.

PETITION FOR PERMISSIVE APPEAL

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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 is incoherent. How is one supposed to prove, at trial, whether MacCudden is "woke"?

Proceeding with this trial will not only subject Defendant, Ms. Johnson, to significant, unrecoverable expense, it would also 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 hearing interlocutory appeals from a denial 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 of petitions for leave to appeal" 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 permit an appeal, now, on the purely legal questions of whether statements like these are actionable as defamation under Wisconsin law, and whether such statements are protected by the First Amendment. This appeal meets all of the criteria for a permissive appeal: it will materially advance the litigation and clarify further proceedings; it will protect Ms. Johnson from substantial *and* irreparable injury, and it will clarify an issue of general importance in the administration of justice. Wis. Stat. § 808.03(2).

STATEMENT OF ISSUES

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

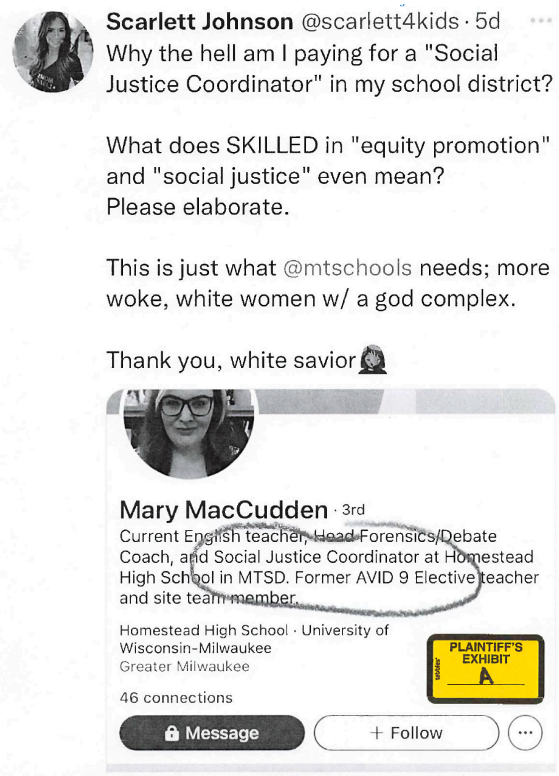
The Circuit Court held yes.

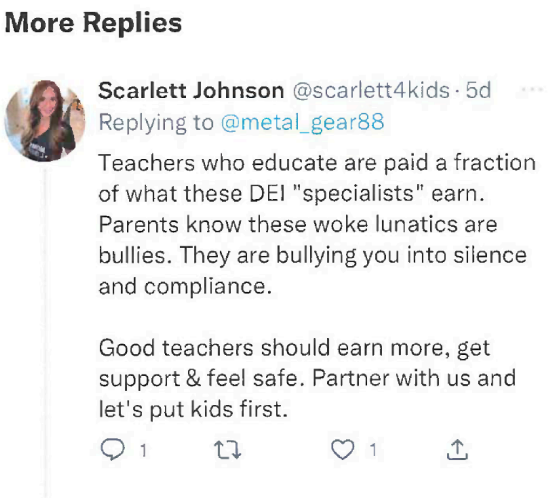
2. Whether Ms. Johnson's posts are protected by the First Amendment from a defamation trial?

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

STATEMENT OF FACTS

MacCudden sued Defendant for defamation over a few social media posts, screenshots of which are below (and at Dkt. 23, Ex. A, D)[1]:





The Circuit Court denied Ms. Johnson's motion to dismiss on July 7, 2023, Dkt. 35, and then partially denied Ms. Johnson's motion for summary judgment on April 22, 2024. App. 1–11; Dkt. 70. The latter order is the subject of this appeal. In both motions, Ms. Johnson argued that her posts are statements of opinion that are not provably false and therefore are not actionable as defamation, and that her speech is protected by the First Amendment. Dkts 26; 57.

The Circuit Court held that some portions of Ms. Johnson's statements are not actionable because they were substantially true:

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

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. 5–7.

But the Circuit Court held that other portions of Ms. 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. 9–10.

Ms. Johnson seeks to appeal that order now to avoid a costly and pointless trial over whether these statements were true or false, given that there is no possible way to prove their truth or not.

REASONS FOR GRANTING LEAVE TO APPEAL

Wis. Stat. § 808.03(2) allows for a permissive appeal of a non-final order[2] if various criteria are met. This appeal meets every single one of these criteria.

Ms. Johnson's Posts Are Protected by the First Amendment and Not Actionable as Defamation; an Appeal Will Clarify the Law and Fix the Circuit Court's Serious Error.

First, an appeal will "[c]larify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2)(c). 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; *Terry v. J. Broad. Corp.*, 2013 WI App 130, ¶ 23, 351 Wis. 2d 479,

[2] The order at issue states that it is "a final order for the purpose of appeal," but it is clearly not. App. 11.

840 N.W.2d 255 (quoting *Milkovich* for this proposition); *Torgerson v. J./Sentinel, Inc.*, 210 Wis. 2d 524, 534–35, 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."); *Kopp v. Sch. Dist. of Crivitz*, 2017 WI App 80, ¶ 39, 378 Wis. 2d 740, 905 N.W.2d 843; *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 21; *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 14 (1970). 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.

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.*

In numerous cases courts have held that insults, names, and criticisms are not actionable for defamation because they are statements

of opinion that cannot be proved true or false. A small sampling of examples include:

- "mean" and "nasty" - *Kopp*, 2017 WI App 80, ¶ 39
- "scam," "rip[ ] off," and "cheat" - *Terry*, 2013 WI App 130, ¶ 23
- "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)
- "racist" - *Stevens*, 855 F.2d at 402
- "terrible experience," "awful customer service," "hypocrite," "chauvinist," and "racist" - *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 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985)
- "mentally imbalanced," "nuts," "crazy," and "Looney Tunes" - *Lieberman v. Fieger*, 338 F.3d 1076, 1080 (9th Cir. 2003)
- "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)

Not only is this black-letter defamation law, it is also constitutionally required. 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). Importantly, in *Milkovich*, the Court recognized that one of those limits is that "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. Likewise, the First Amendment protects "statements that cannot 'reasonably be interpreted as stating actual facts' about an individual," like "imaginative expression" or "rhetorical hyperbole." *Id.* (citations omitted).

The Circuit Court wrongly held that Ms. Johnson's posts stating that social justice coordinators like MacCudden are "woke," have "a god complex," and the like, 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. 9–10. This holding is deeply misguided, for two independently sufficient reasons.

First, Ms. Johnson's posts do not remotely imply to the reader that she is asserting that MacCudden "abuses her position of power over students" or is "unfit[ ] to teach." *Id.* As Wisconsin courts have long held, 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 v. Beckett*, 2015 WI App 70, ¶ 21, 365 Wis. 2d 148, 870 N.W.2d 466; *Terry*, 2013 WI App 130, ¶ 19 ("the 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. 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 Ms. 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. 9–10. Ms. Johnson was primarily objecting to the fact that her school district had and paid for a social justice coordinator, and commenting 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, an opinion she is entitled to hold and express publicly. *Supra* p. 5. 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 the 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. 5 (emphases added).

Second, and perhaps more fundamentally, even if Ms. 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 is 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 young children, 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, Ms. Johnson did not imply either thing, but even if she had, she is entitled to have and to express those opinions.

An Appeal Now Will Spare Both Ms. Johnson and the Court System From a Costly, Pointless, and Incoherent Trial.

Second, an appeal will *both* "advance the termination of the litigation" and "clarify further proceedings in the litigation." Wis. Stat. § 808.03(2)(a). If this Court reverses in Ms. Johnson's favor, as all of the authority just discussed compels, the case will be over, and Ms. Johnson

will not have to prepare for or incur the significant costs—financial, temporal, and emotional—of preparing for and going through a trial. Any judgment in MacCudden's favor is likely to be reversed on appeal on the very grounds Ms. Johnson seeks to appeal now. Likewise, both the court system and any jurors will also avoid having to waste their time on a meaningless trial that will likely be reversed on appeal.

Even if this Court were to affirm the Circuit Court's ruling, an appeal now will substantially help to clarify what exactly the parties have to prove in any trial over Ms. Johnson's posts. As it stands right now, it is not clear at all how the parties are supposed to prove at trial whether MacCudden is "woke" or a "white savior"—or even whether she is "fit" to teach (though again, Ms. Johnson said nothing about MacCudden's fitness to teach). It is also hard to see how Ms. Johnson would go about proving the truth of any implied facts without knowing what the jury thinks those implied facts are. To the extent this Court affirms the Circuit Court's ruling in whole or in part, it can clarify with far more precision what exactly the trial will be about.

Without This Court's Intervention, Ms. Johnson Will Sustain Substantial and Irreparable Injury by Being Deprived of Her First Amendment Rights and Subjected to a Costly, Unnecessary Trial.

Finally, this Court's review is necessary to prevent substantial and irreparable harm to Ms. Johnson. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). And because "[c]ostly and time-consuming defamation litigation can threaten [these] essential freedoms," which are necessary to ensure that "reporters, commentators, bloggers, and tweeters (among others) [have] the breathing room they need to pursue the truth, the Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits." *Kahl*, 856 F.3d at 109 (opinion of then-Judge Kavanaugh) (reviewing, on interlocutory appeal due to "the importance of the First

Amendment issue," the district court's denial of defendant's motion for summary judgment in a defamation case). Such review is precisely what is needed from this Court.

As explained *supra*, Part I, the statements at issue in this case are protected by the First Amendment, and the Circuit Court's contrary finding is clearly erroneous. Without this Court's intervention, the effect is not only the chilling of Ms. Johnson's First Amendment rights (which, again, is an irreparable injury), but also an unnecessary trial that will subject Ms. Johnson to "costly and time-consuming" litigation over a claim that is clearly "unmeritorious." *Kahl*, 856 F.3d at 109.

As the Supreme Court put in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485 (1975), if a state court action violates First Amendment rights, "there should be no trial at all." 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.*; *see also Kahl*, 856 F.3d at 116 ("Summary proceedings 'are essential in the First Amendment area because if a suit entails 'long and expensive litigation,' then the protective purpose of the First Amendment is thwarted even if the defendant ultimately prevails.'") (citations omitted).

Indeed, in light of the First Amendment implications, the Wisconsin Supreme Court has emphasized that, in defamation cases, summary judgment should be "the rule, and not the exception," "to mitigate the potential 'chilling effect' on free speech and the press that might result from lengthy and expensive litigation." *Torgerson*, 210 Wis. 2d 524, ¶ 29 (citations omitted). In same way, appellate courts must

"make an independent examination" to avoid a "forbidden intrusion on the field of free expression." *Id.* ¶ 27 (quoting *Sullivan*, 376 U.S. at 285). And the Court has directed the Court of Appeals to "carefully weigh whether there is a need for interlocutory appeal" in defamation cases with First Amendment implications. *Lassa*, 2006 WI 105, ¶ 89.

Because this case involves a serious First Amendment issue that will result in irreparable harm without further review, it is imperative that this Court "remain sensitive to the need to prevent First Amendment harms" and grant Ms. Johnson's request for interlocutory appeal. *Lassa*, 2006 WI 105, ¶ 88 (citations omitted). As in *Kahl*, MacCudden's remaining defamation claims do not survive summary judgment, and the Circuit Court erroneously concluded otherwise. *See Kahl*, 856 F.3d 106. Without this Court's intervention, Ms. Johnson will suffer irreparable injury by being deprived of her First Amendment freedoms and subjected to participation in a costly, unnecessary trial.

For these reasons, this Court should grant Ms. Johnson's petition for interlocutory appeal.

CONCLUSION

Ms. Johnson respectfully requests leave to pursue a permissive appeal, pursuant to Wis. Stat. §§ 808.03(2) and 809.50.

Dated: May 6, 2024.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
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Electronically signed by Luke N. Berg

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CERTIFICATION

I hereby certify that this petition for permissive appeal conforms to the rules contained in Wis. Stat. § 809.50(1), (4) for a petition produced with a proportional serif font. The length of this petition is 3,534 words.

I also certify that the appendix to this petition contains the judgement or order sought to be reviewed as required by Wis. Stat. § 809.50(1)(d).

Dated: May 6, 2024.

Electronically signed by Luke N. Berg
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