

ANTI-SLAPP COVERAGE AND THE FIRST AMENDMENT: HURDLES TO DEFAMATION SUITS IN POLITICAL CAMPAIGNS

DAVID L. HUDSON, JR.*

Defamation cases often arise out of intemperate or offensive statements made in political campaigns. These comments may refer to a candidate's criminal history, familial conduct, or other matters. Whatever the subject, emotions undoubtedly run high during hotly contested campaigns.

However, First Amendment protection is at its zenith when speakers engage in political speech, and speech about political candidates is inherently political speech. Thus, defamation suits arising out of political campaigns face significant hurdles, including (1) anti-SLAPP statutes and a greater public awareness of SLAPP suits; (2) a history and tradition of mudslinging and enhanced protection of political speech during political campaigns; and (3) the first-amendment-inspired doctrine of rhetorical hyperbole. This Article addresses these three obstacles.

TABLE OF CONTENTS

Introduction	1542
I. Anti-SLAPP Statutes	1542
II. History of Political Mudslinging and the Enhanced Protection of Political Speech	1549
III. Rhetorical Hyperbole	1553
Conclusion.....	1557

* David L. Hudson, Jr. is a First Amendment Fellow for the Freedom Forum Institute and a Justice Robert H. Jackson Fellow for the Foundation for Individual Rights in Education. He also serves as an assistant professor of law at *Belmont University College of Law*. He is the author, coauthor, or coeditor of more than forty books, including *THE FIRST AMENDMENT: FREEDOM OF SPEECH* (Thomson Reuters, 2012) and *THE ENCYCLOPEDIA OF THE FIRST AMENDMENT* (Sage, 2008) (coeditor).

INTRODUCTION

During the course of a contentious campaign, unflattering social media posts trickle in about a political candidate's past indiscretions, familial issues, and complicated political records. The candidate loses a narrow election. The candidate then sues for defamation after losing an election. She believes that the defamatory comments about her were false statements of fact that not only harmed her reputation but also cost her the election.

Such is not a farfetched reality, as political candidates often sue their opponents or other individuals for intemperate campaign mudslinging.¹ Much of this speech, as with nearly all other forms of speech, takes place in the form of posts on social media, a venue that has become the push point for much litigation.²

But such online defamation lawsuits that arise in the context of political campaigns face several significant hurdles. This Essay addresses several such hurdles, including (1) greater public awareness of SLAPP suits and stronger anti-SLAPP laws; (2) a history of political mudslinging during political campaigns and the strong protection of political speech; and (3) the defense of rhetorical hyperbole.

I. ANTI-SLAPP STATUTES

In the 1980s, the term "SLAPP" entered the public lexicon as a catchy acronym for Strategic Lawsuits Against Public Participation. Coined by Professors George Pring and Penelope Canan, the term applied to

1. David Frum, *Tulsi Gabbard Sues for Attention*, ATLANTIC (Jan. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/tulsi-gabbard-sues-attention/605374>; Bryan Schatz, *Darrell Issa is Suing His Defeated Opponent for Libel*, MOTHER JONES (Dec. 1, 2016), <https://www.motherjones.com/politics/2016/12/darrell-issa-libel-lawsuit-doug-applegate> [<https://perma.cc/7DVA-GM9X>]; Riley Snyder, *Tarkanian Libel Lawsuit Against Jacky Rosen, 2016 Opponent, Blocked by Nevada Supreme Court*, NEV. INDEP. (Dec. 12, 2019, 2:03 PM), <https://thenevadaindependent.com/article/tarkanian-libel-lawsuit-against-jacky-rosen-2016-opponent-blocked-by-supreme-court> [<https://perma.cc/92QV-LLVU>]; Brian Whitehead, *San Bernardino City Council Candidate Sues Opponent for Defamation, Libel*, SAN BERNARDINO SUN (Nov. 1, 2018, 3:09 PM), <https://www.sbsun.com/2018/11/01/san-bernardino-city-council-candidate-sues-opponent-for-defamation-libel> [<https://perma.cc/ES3Z-6GQR>].

2. Cory Batza, Comment, *Trending Now: The Role of Defamation Law in Remediating Harm from Social Media Backlash*, 44 PEPP. L. REV. 429, 433 (2017) (noting that "[v]ictims of defamatory statements on social media have increasingly begun suing for defamation"); David L. Hudson, Jr., *Free Speech or Censorship? Social Media Litigation is a Hot Legal Battleground*, A.B.A.J. (Apr. 1, 2019, 12:05 AM), <http://www.abajournal.com/magazine/article/social-clashes-digital-free-speech> [<https://perma.cc/3JZV-4K5Q>].

lawsuits often filed by developers and other large construction companies against citizen-activists who objected to alleged environmental abuses.³ The two University of Denver professors identified the phenomenon as part of a “new and very disturbing trend”⁴—citizens being sued merely for exercising their First Amendment rights.

The plaintiffs in these lawsuits sought to “‘privatize’ public debate” through the judiciary.⁵ The result was that in tens of thousands of cases, citizens were “sued into silence.”⁶ Such lawsuits “chill the right of free expression and free access to government, a double-barreled assault on the core values of our society.”⁷

In other words, SLAPP lawsuits seek to limit public participation. For this reason, many anti-SLAPP statutes are called Citizen Public Participation Acts.⁸ These lawsuits often assert such causes of action as defamation, malicious prosecution, interference with existing contractual relations, abuse of process, or conspiracy to commit these wrongs.⁹

A New York judge captured the negative essence of SLAPP suits in this colorful description:

SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial resources and emotional stamina to play out the “game” face the difficult choice of

3. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT 3–5 (1996); Penelope Canan & George W. Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 L. & SOC’Y REV. 385, 386–89 (1988).

4. George W. Pring & Penelope Canan, “*Strategic Lawsuits Against Public Participation*” (“SLAPPs”): *An Introduction for Bench, Bar and Bystanders*, 12 BRIDGEPORT L. REV. 937, 938 (1992).

5. *Id.* at 941 (internal quotation marks omitted).

6. George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 3 (1989).

7. Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 971 (1999).

8. *See, e.g.*, S.B. 1097, 2019 Gen. Assemb. (Tenn. 2019) (“This chapter shall be known and may be cited as the ‘Tennessee Public Participation Act.’”).

9. Pring & Canan, *supra* note 4, at 947.

defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suits will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.¹⁰

Many believed that there needed to be an efficient way for victims of SLAPP suits to fight back—or SLAPP back. This led to the creation of anti-SLAPP statutes. The idea behind so-called “anti-SLAPP” laws was that there should be a procedural mechanism in place to protect citizens who have been sued by wealthy corporate actors merely to intimidate and silence those citizens for exercising their First Amendment freedoms of petition or speech.¹¹ Originally, the statutes were designed to provide protection primarily to the citizen-activist who opposed the unfriendly environmental activities of a construction company or large developer.¹² Today, however, SLAPP suits reach a much broader range of cases. Scholar Eric Goldman explained, “I think about SLAPPS as covering any lawsuit that’s designed to suppress socially important speech [such as consumer reviews or investigative journalism] . . . there’s a wide range of other kinds of socially important content that we want to encourage and foster.”¹³

Recognizing the dangers of SLAPP suits on citizen participation, beginning in 1989, state legislatures began enacting so-called anti-SLAPP laws that were designed to provide a procedural mechanism for individuals to quickly dismiss meritless lawsuits merely designed to silence the defendant’s voice.¹⁴ These statutes provide an expedited

10. *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992) (footnote omitted).

11. Matthew D. Bunker & Emily Erickson, *#aintturningtheothercheek: Using Anti-SLAPP Law as a Defense in Social Media*, 87 UMKC L. REV. 801, 802 (2019).

12. See PRING & CANAN, *supra* note 3, at 193–94 (explaining the enactment of New York’s anti-SLAPP law, which focused narrowly on the relations between companies seeking permits for public projects and individuals who comment or report on those public projects).

13. Eric Weslander, *The First Amendment SLAPPS Back: An Overview of the Free-Speech Protections of Kansas’ New Anti-SLAPP Statute*, J. KAN. B. ASS’N, Jan. 2018, at 30, 33 (quoting Congressional Internet Caucus Academy, *Frivolous Defamation Suits vs. Online Reviews—Gagged by the Law(yers)?*, YOUTUBE (June 7, 2017), <https://www.youtube.com/watch?v=q0L2efr0rSc> [<https://perma.cc/9YK4-CAKK>] (statements of Eric Goldman)).

14. See, e.g., 1989 WASH. SESS. LAWS 1119–20 (codified as amended at WASH. REV. CODE § 4.24.510 (2019)) (explaining that a person who acts in good faith when reporting a “complaint or information to any agency . . . regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency”).

procedural process for defendants to rid themselves of frivolous litigation.¹⁵ This expedited procedure usually includes a stay of discovery that forces a court to decide a special motion to dismiss within a specific time frame.¹⁶ If the defendant is successful in SLAPPING back at the SLAPP suit, then these laws generally provide that the defendant can obtain attorney fees and costs from the plaintiff who filed the lawsuit.¹⁷

While such laws were designed to protect public activists who spoke out against large corporate developers or other entities, the concept of a SLAPP suit has morphed considerably. Now, the reach of many anti-SLAPP statutes has expanded to cover freedom of speech, petition, and association generally.¹⁸ California's anti-SLAPP statute, for example, allows a defendant in a SLAPP suit to file a "special motion to strike" the suit if the suit arose from the exercise of a defendant's "right [to] petition or free speech . . . in connection with a public issue."¹⁹ The California law explicitly says that it "shall be construed broadly."²⁰

Florida's anti-SLAPP statute also applies broadly to "free speech in connection with public issues," which is defined broadly as "any written or oral statement that is protected under applicable law and is made before a governmental entity in connection with an issue under consideration or review by a governmental entity."²¹

Tennessee's new anti-SLAPP statute, called the Tennessee Public Participation Act, is also broad.²² This new law aims to prevent lawsuits that are designed to chill individuals' rights to freedom of association, speech, or petition.²³ Maryland's statute ostensibly envisions broad coverage, as it applies to protect a person's right to speak on "any issue of public concern."²⁴

15. Robert T. Sherwin, *Evidence? We Don't Need No Stinkin' Evidence!: How Ambiguity in Some States' Anti-SLAPP Laws Threatens to De-Fang a Popular and Powerful Weapon Against Frivolous Litigation*, 40 COLUM. J.L. & ARTS 431, 433 (2017).

16. *Id.* at 433, 437.

17. *Id.* at 437.

18. Dale W. Felton, *Avoid the SLAPP Trap*, HOUS. LAW., July/Aug. 2019, at 22, 22.

19. CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2019).

20. § 425.16(a).

21. FLA. STAT. § 768.295(2)(a) (2019).

22. See S.B. 1097, 2019 Gen. Assemb. (Tenn. 2019). This measure passed the Tennessee legislature and was signed by the governor. It went into effect on July 1, 2019.

23. TENN. CODE ANN. § 20-17-103(2)-(4) (2019).

24. MD. CODE ANN., CTS. & JUD. PROC. § 5-807(c) (LexisNexis 2019).

In contrast, anti-SLAPP laws in other states are more restrictive. Missouri's anti-SLAPP statute applies to lawsuits against a person "for conduct or speech undertaken or made in connection with a public hearing or public meeting, in a quasi-judicial proceeding before a tribunal or decision-making body of the state or any political subdivision of the state."²⁵ Pennsylvania has an anti-SLAPP statute, called the Environmental Immunity Act, which applies only to statements made in relation to an environmental issue or regulation.²⁶ Delaware's anti-SLAPP law applies only to acts of "public petition and participation."²⁷

The above-cited examples show that anti-SLAPP suits differ significantly in terms of wording, process, and coverage. The more effective anti-SLAPP suits apply to a broader range of suits. Thus, the preferable model is one similar to California or the new Tennessee law, which applies more broadly to communications that touch on matters of public interest or concern.²⁸ That certainly furthers free-expression rights more than some that only protect individuals when they directly petition a governmental agency.

The result has been that defamation suits arising out of political campaigns often have been subject to anti-SLAPP statutes—in other words, the plaintiffs have been SLAPPED back. Courts have recognized that statements made during political campaigns are inherently speech on matters of public interest that are most appropriate for application of anti-SLAPP statutes.²⁹ Take, for example, the defamation lawsuit filed by Nevada casino mogul Sheldon Adelson for negative statements made about him during the 2012 Presidential election when he contributed substantial amounts of money to Newt Gingrich and Mitt

25. MO. REV. STAT. § 537.528(1) (2019).

26. 27 PA. CONS. STAT. § 8301 (2019); *see also* Pennsbury Village Associates, LLC v. McIntyre, 11 A.3d 906, 912 (Pa. 2011) (referring to the Pennsylvania anti-SLAPP statute as the Environmental Immunity Act in the first Pennsylvania Supreme Court case interpreting the statute).

27. 10 DEL. CODE ANN. tit. 10, § 8136(a)(1) (2019).

28. *See supra* notes 19–20, 23 and accompanying text (explaining the wide application of the California and Tennessee anti-SLAPP statutes).

29. *Collier v. Harris*, 192 Cal. Rptr. 3d 31, 38–40 (Ct. App. 2015) ("The character and qualifications of a candidate for public office constitutes a "public issue or public interest" for purposes of [the anti-SLAPP statute] . . . [The statute therefore] 'applies to suits involving statements made during political campaigns.'" (first quoting *Vogel v. Felice*, 26 Cal. Rptr. 3d 350, 357 (Ct. App. 2005); and then quoting *Conroy v. Spitzer* 83 Cal. Rptr. 2d 443, 446 (1999))).

Romney.³⁰ According to Adelson, officers of the National Jewish Democratic Council posted a statement on their website urging followers to pressure then-presidential candidate Mitt Romney to abstain from accepting money from Adelson, which, the statement claimed, Adelson earned from promoting prostitution in his Chinese casinos.³¹ Despite these statements, the court dismissed Adelson’s suit pursuant to the Nevada anti-SLAPP law because the speech was clearly political: “the [National Jewish Democratic Council’s online statements] were patently partisan statements made by a Democratic organization to Democratic-leaning voters in an effort to undermine Republican candidates’ financial support.”³²

More recently, Danny Tarkanian, former point guard and son of the legendary University of Nevada, Las Vegas basketball coach Jerry Tarkanian,³³ filed a defamation lawsuit against Jacky Rosen, whom he opposed in the United States House of Representatives race in 2016.³⁴ Tarkanian sued over an ad entitled “Integrity” that Rosen uploaded to YouTube and other social media platforms.³⁵

Tarkanian objected to three statements: “Danny Tarkanian set up 13 fake charities that preyed on vulnerable seniors”; “seniors lost millions from the scams Danny Tarkanian helped set up”; and a statement that called Tarkanian’s charities “fronts for telemarketing schemes.”³⁶ After Tarkanian filed suit for libel per se, slander per se, and intentional infliction of emotional distress, Rosen responded by filing a motion to dismiss under the Nevada anti-SLAPP statute.³⁷ The Nevada Supreme Court granted Rosen’s motion to dismiss under the anti-SLAPP statute, noting that the gist of her statements was true, “or at the very least her statements were made without actual malice.”³⁸

30. See *Adelson v. Harris*, 973 F. Supp. 2d 467, 471–73, 487, 503 (S.D.N.Y. 2013) (applying Nevada’s anti-SLAPP statute to online statements made about Adelson, including that his money was “dirty” and “tainted”), *aff’d*, 876 F.3d 413 (2d Cir. 2017).

31. *Id.* at 471–73.

32. *Id.* at 496.

33. Alexander Bolton, *Shark, Jr. Hopes to Take '10 Bite out of Sen. Reid*, HILL (Sept. 10, 2009, 10:05 AM), <https://thehill.com/homenews/campaign/58025-shark-jr-hopes-to-take-10-bite-out-of-sen-reid> [<https://perma.cc/V235-BQHY>]; see also Tarkanian, Danny, OUR CAMPAIGNS, <https://www.ourcampaigns.com/CandidateDetail.html?CandidateID=44640> [<https://perma.cc/J76G-N4PM>].

34. *Rosen v. Tarkanian*, 453 P.3d 1220, 1221–22 (Nev. 2019) (en banc); Snyder, *supra* note 1.

35. *Rosen*, 453 P.3d at 1222.

36. *Id.*

37. *Id.*

38. *Id.* at 1222, 1225–26.

A Texas appeals court reached a similar result in a case involving a former city councilman who sued a sitting councilperson and others for allegedly defamatory statements made on Facebook and other venues.³⁹ Frank Fernandez, a former councilman in Kennedale, pleaded guilty to the crime of misdemeanor theft for stealing a silver bar.⁴⁰ A sitting member of the council and others made a variety of statements about him on Facebook and other places that he claimed were untrue, including the statement that he had “committed robbery while being a Kennedale city council member.”⁴¹

The Texas appeals court easily found that the challenged statements were statements covered by the Texas anti-SLAPP statute because the statements “were made during a political contest.”⁴² The Texas appeals court applied the substantial truth doctrine,⁴³ which calls for courts to examine the veracity of the alleged defamatory statements from the perspective of “a person of ordinary intelligence,” and granted the special motion to dismiss under the anti-SLAPP law.⁴⁴

The passage of stronger anti-SLAPP laws has increased the public’s consciousness of frivolous lawsuits. It also has led some to question whether some of these laws go too far and violate the constitutional rights of those who file the lawsuits in the first place.⁴⁵

But, an even more pressing reason exists for thoughtful discussion of anti-SLAPP lawsuits—the astronomical expansion of speech during the social media age.⁴⁶ As one student commentator cogently explained:

39. Weber v. Fernandez, No. 02-18-00275-CV, 2019 WL 1395796, at *2 (Tex. App. Mar. 28, 2019).

40. *Id.*

41. *Id.*

42. *Id.* at *5–6.

43. *Id.* at *1, *8, *11–13.

44. *Id.* at *20.

45. Nick Phillips & Ryan Pumpian, *A Constitutional Counterpunch to Georgia’s Anti-SLAPP Statute*, 69 MERCER L. REV. 407, 408 (2018); Mitch Landberg, *Anti-SLAPP: A Constitutional Tug-of-War*, LAW360 (June 25, 2015, 10:47 AM), <https://www.law360.com/articles/670930/anti-slapp-a-constitutional-tug-of-war> (noting that anti-SLAPP statutes can infringe on the First Amendment right to petition as well as the right to trial by jury).

46. Lauren Bergelsen, Note, *The Need for a Federal Anti-SLAPP Law in Today’s Digital Media Climate*, 42 COLUM. J.L. & ARTS 213, 214 (2019).

The expansion of anti-SLAPP to public speech, particularly on the Internet, presents a dilemma for policymakers: should they protect the rights of petition and free speech from increased threat of chilling, or should they protect defamation victims who are at a significantly greater risk of harm from online libel? . . . The expansion of anti-SLAPP laws into the realm of Internet defamation law has upped the ante—the stakes for speakers and those they speak about have risen significantly.⁴⁷

While the stakes are higher, so are the hurdles for those seeking to sue for defamation arising from social media posts about political campaigns. Such speech has a hearty tradition and history of societal acceptance and First Amendment protection.

II. HISTORY OF POLITICAL MUDSLINGING AND THE ENHANCED PROTECTION OF POLITICAL SPEECH

Political campaigns historically have consisted of mudslinging, muckraking, name calling, and other less than virtuous behavior.⁴⁸ The Federalists and Democratic-Republicans engaged in virtual warfare through the press via pseudonyms, attacking each other's positions on a variety of issues.⁴⁹ Ultimately, the Federalist Party used a federal law known as the Sedition Act of 1798 to silence and even imprison Democratic-Republican opponents.⁵⁰ The Act “criminalized many political speakers who engaged in speech about the proper workings of a democratic government.”⁵¹

Through the years, politicians frequently engaged in mean-spirited dialogue when referring to their opponents. Incivility—rather than civility—ruled the day. A legal commentator more than fifty years ago aptly noted that “[c]harges of gross incompetence, disregard of the public interest, communist sympathies, and the like usually have filled

47. Andrew L. Roth, Comment, *Upping the Ante: Rethinking Anti-SLAPP Laws in the Age of the Internet*, 2016 BYU L. REV. 741, 768 (2016).

48. See JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 32–33, 186–87, 201 (2000) (chronicling the divisive exchanges between Alexander Hamilton and Aaron Burr preceding their duel at Weehawken and the tumultuous political events of the late 1790s between the Federalists and Democratic-Republicans).

49. See *id.* at 197–99 (portraying the fractious political debates between Federalists and Democratic-Republicans in the late 1790s).

50. See generally JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 131, 247, 251–54 (1956) (discussing prosecutions in New England under the Sedition Act, where Democratic-Republican printers were indicted and tried for printing and publishing “seditious libel”).

51. DAVID L. HUDSON, JR., THE FIRST AMENDMENT: FREEDOM OF SPEECH § 1:2 (2012).

the air; and hints of bribery, embezzlement, and other criminal conduct are not infrequent.”⁵² More recently, another legal commentator stated, “Lies in politics and political campaigns are nothing new.”⁵³

Consider the particularly apt statement from a California appeals court:

Our political history reeks of unfair, intemperate, scurrilous and irresponsible charges against those in or seeking public office. Washington was called a murderer, Jefferson a blackguard, a knave and insane (“Mad Tom”), Henry Clay a pimp, Andrew Jackson a murderer and an adulterer, and Andrew Johnson and Ulysses Grant drunkards. Lincoln was called a half-witted usurper, a baboon, a gorilla, a ghoul. Theodore Roosevelt was castigated as a traitor to his class, and Franklin Delano Roosevelt as a traitor to his country. Dwight D. Eisenhower was charged with being a conscious agent of the Communist Conspiracy.⁵⁴

During the 1800 election between incumbent John Adams and his former vice president Thomas Jefferson, Adams’ supporters falsely claimed that if Jefferson won the election, Americans “would see their wives and daughters the victims of legal prostitution.”⁵⁵ In the 1880s, President Grover Cleveland was accused of fathering a child out of wedlock and had to endure campaign chants of “Ma, Ma, Where’s My Pa?”⁵⁶

The reality is that one should expect that statements made during the course of a political campaign often will be contentious and unpleasant.⁵⁷ Many degenerate into a “reckless disregard for the truth.”⁵⁸ Another commentator emphasizes that political campaigns are riddled with negative and false advertising.⁵⁹ This phenomenon leads to a “diminution of the public debate” and thoughtful discourse.⁶⁰

52. Dix W. Noel, *Defamation of Public Officers and Candidates*, 49 COLUM. L. REV. 875, 875 (1949).

53. Catherine J. Ross, *Ministry of Truth: Why Law Can’t Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 367 (2017).

54. *Desert Sun Publ’g Co. v. Superior Court*, 158 Cal. Rptr. 519, 521 (Ct. App. 1979).

55. Jason Zenor, *A Reckless Disregard for the Truth?: The Constitutional Right to Lie in Politics*, 38 CAMPBELL L. REV. 41, 44 (2016) (quoting Rick Ungar, *The Dirtiest Campaign Ever? Not Even Close!*, FORBES (Aug. 20, 2012, 7:50 PM), <https://www.forbes.com/sites/rickungar/2012/08/20/the-dirtiest-presidential-campaign-ever-not-even-close> [<https://perma.cc/U8KP-LT4X>]).

56. *Id.* at 44.

57. *Secrist v. Harkin*, 874 F.2d 1244, 1249 (8th Cir. 1989) (“There may be no public context more contentious than a political campaign.”).

58. Zenor, *supra* note 55, at 43.

59. Lee Goldman, *False Campaign Advertising and the “Actual Malice” Standard*, 82 TUL. L. REV. 889, 890 (2008).

60. *Id.* at 895.

Robert Bork, then an appeals court judge on the D.C. Circuit, explained that libel suits arising out of political campaigns often must fail because of the First Amendment. Judge Bork explained in two noteworthy passages:

It arouses concern that a freshening stream of libel actions, which often seem as much designed to punish writers and publications as to recover damages for real injuries, may threaten the public and constitutional interest in free, and frequently rough, discussion. Those who step into areas of public dispute, who choose the pleasures and distractions of controversy, must be willing to bear criticism, disparagement, and even wounding assessments. Perhaps it would be better if disputation were conducted in measured phrases and calibrated assessments, and with strict avoidance of the *ad hominem*; better, that is, if the opinion and editorial pages of the public press were modeled on *The Federalist Papers*. But that is not the world in which we live, ever have lived, or are ever likely to know, and the law of the first amendment must not try to make public dispute safe and comfortable for all the participants. That would only stifle the debate.⁶¹

Judge Bork continued in his concurring opinion:

In deciding a case like this, therefore, one of the most important considerations is whether the person alleging defamation has in some real sense placed himself in an arena where he should expect to be jostled and bumped in a way that a private person need not expect. Where politics and ideas about politics contend, there is a first amendment arena. The individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal.⁶²

Another California appeals court perhaps summed it up best: “In America, one who seeks or holds public office may not be thin of skin. One planning to engage in politics, American style, should remember the words credited to Harry S. Truman[:] ‘If you can’t stand the heat, get out of the kitchen.’”⁶³

The court’s reference to President Truman’s famous phrase indicates a mindset by the judiciary that political candidates entering the arena should expect to deal with much intemperate, obnoxious, and perhaps defamatory expression. But history and tradition are not the only reasons why many courts seemingly disfavor defamation suits

61. *Ollman v. Evans*, 750 F.2d 970, 993 (D.C. Cir. 1984) (en banc) (Bork, J., concurring).

62. *Id.* at 1002 (emphasis added).

63. *Desert Sun Publ’g Co. v. Superior Court*, 158 Cal. Rptr. 519, 521 (Ct. App. 1979).

filed by political candidates. The other main reason is the First Amendment's staunch protection of political speech in general.

The text of the First Amendment draws no textual distinctions based on the type of speech, reading only that "Congress shall make no law . . . abridging the freedom of speech."⁶⁴ However, the reality is otherwise. First Amendment jurisprudence accords different levels of protection depending upon the type of speech.⁶⁵ For example, commercial speech receives less protection, as does sexual expression.⁶⁶

But political speech represents the core type of speech the First Amendment was designed to protect.⁶⁷ The U.S. Supreme Court famously declared that there is 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."⁶⁸ Two years later, the Court explained: "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."⁶⁹

The reality, as one state supreme court jurist wrote years ago: "Political speech involving public officials, *especially that made during political campaigns*, seems to be especially protected."⁷⁰

64. U.S. CONST. amend. I.

65. HUDSON, *supra* note 51, § 2:5 ("Although the text of the First Amendment provides that 'Congress shall make no law,' the freedom does not protect *all* types of speech.").

66. *Id.* § 6:1 ("Commercial speech, or advertising, represents a category of speech that receives a reduced level of First Amendment protection."); *id.* § 4.1 ("Pornography and sexual expression historically have received scant free-speech protection.").

67. Meyer v. Grant, 486 U.S. 414, 425 (1988) (noting that political speech represents the "zenith" of First Amendment protection); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 309 (2004) (noting that "protection of speech of a political nature lies at the 'core' of the First Amendment").

68. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

69. Mills v. Alabama, 384 U.S. 214, 218 (1966).

70. Camp v. Yeager, 601 So. 2d 924, 931 (Ala. 1992) (Maddux, J., dissenting).

III. RHETORICAL HYPERBOLE

One concept that provides significant breathing space to freedom of expression is rhetorical hyperbole.⁷¹ Rhetorical hyperbole has been defined as “‘extravagant exaggeration’ ‘employed for rhetorical effect.’”⁷² This concept provides that even heated and emotional rhetoric deserves free-speech protection in a free society.⁷³ The U.S. Supreme Court ruled that the use of the term “blackmail” to refer to a developer’s negotiating style was rhetorical hyperbole more than an imputation of criminal conduct.⁷⁴ The Court reasoned that “even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the developer’s] negotiating position extremely unreasonable.”⁷⁵

The U.S. Supreme Court also applied the concept to determine that a union’s use of the term “scab” was rhetorical hyperbole rather than unprotected defamation.⁷⁶ The Court reasoned that the use of the term in a union dispute was an example of “loose, figurative” language rather than defamation.⁷⁷ The Court further explained that the use of the term did not imply that the employees were actually committing crimes.⁷⁸

In yet another defamation case, the U.S. Supreme Court again discussed the doctrine of rhetorical hyperbole. The Court noted that “statements that cannot reasonably [be] interpreted as stating actual facts about an individual” made in debate over public matters are constitutionally protected to “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.”⁷⁹

More than twenty years later, scholar Lyrissa Barnett Lidsky presciently noted that it is “fair to predict that many of the new Internet

71. David L. Hudson, Jr., *Rhetorical Hyperbole Protects Free Speech*, FREEDOM F. INST. (Oct. 28, 2018), <https://www.freedomforuminstitute.org/2018/10/28/rhetorical-hyperbole-protects-free-speech> [<https://perma.cc/L9QW-P6L6>].

72. *Am. Broad. Cos. v. Gill*, 6 S.W.3d 19, 30 (Tex. App. 1999) (quoting WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 592, 1011 (1988)).

73. *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002).

74. *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6, 13–14 (1970).

75. *Id.* at 14.

76. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 285–86 (1974).

77. *Id.* at 284.

78. *Id.* at 285.

79. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990) (alteration in original).

libel cases will involve rhetorical hyperbole.”⁸⁰ What Lidsky—or most people—probably could not have predicted is that the defense would protect Donald J. Trump as President of the United States of America instead of as a celebrity television star.⁸¹

President Trump certainly has a penchant for engaging in rhetorical hyperbole, and the doctrine has proven an effective defense in litigation.⁸² For example, a federal district court in California found that President Trump’s negative tweets about Stephanie Clifford, a.k.a. Stormy Daniels, were rhetorical hyperbole protected by the First Amendment.⁸³ The Court reasoned that the Trumpian communications were made in response to criticism of the President: “If this Court were to prevent Mr. Trump from engaging in this type of ‘rhetorical hyperbole’ against a political adversary, it would significantly hamper the office of the President.”⁸⁴

Similarly, a Texas appeals court used the doctrine of rhetorical hyperbole in a defamation suit that arose during a political campaign in *Rehak Creative Services, Inc. v. Witt*.⁸⁵ The case involved various posts made to the campaign website of Ann L. Witt, who ran unsuccessfully for the 2012 Republican primary for House District 133.⁸⁶ Witt challenged incumbent Jim Murphy, who had held the position since 2006 and previously had been president of a “municipal management district” in a part of Houston known as the Westchase District.⁸⁷

Before serving, Murphy sought an opinion as to whether he could serve both in the legislature and as president of the Westchase District.⁸⁸ During the campaign, Witt accused Murphy of “sidestep[ping]” the Texas

80. Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 855, 943 (2000).

81. See Patrick Radden Keefe, *How Mark Burnett Resurrected Donald Trump as an Icon of American Success*, NEW YORKER (Dec. 27, 2018), <https://www.newyorker.com/magazine/2019/01/07/how-mark-burnett-resurrected-donald-trump-as-an-icon-of-american-success> [<https://perma.cc/D344-BE26>].

82. David L. Hudson, Jr., *The First Amendment Has Protected President Donald J. Trump*, FREEDOM F. INST. (Dec. 2, 2019), <https://www.freedomforuminstitute.org/2019/12/02/the-first-amendment-has-protected-president-donald-j-trump> [<https://perma.cc/LT7Y-82F8>].

83. *Clifford v. Trump*, 339 F. Supp. 3d 915, 926 (C.D. Cal. 2018) (explaining that President Trump’s tweet exclaimed “[a] sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!”).

84. *Id.* at 927.

85. 404 S.W.3d 716 (Tex. App. 2013).

86. *Id.* at 719–21.

87. *Id.* at 720.

88. *Id.* at 720.

Constitution by serving in the legislature while receiving payments as a consultant to Westchase District through a limited liability company that Murphy created and of which he was the sole member.⁸⁹

On a campaign website titled “How to Succeed in Government Without Really Trying,” Witt essentially accused Murphy of improperly lining his own pockets while serving as a politician. One of the posts read:

STEP 1: Help create a new taxing entity.

STEP 2: Hire yourself as its top bureaucrat.

STEP 3: Make \$290,000 a year off taxpayers.

STEP 4: Sidestep that pesky Texas Constitution.

STEP 5: Get a second government job.

STEP 6: Reward your supporters with government contracts.⁹⁰

Another version of this six-step success process stated that “Westchase District has awarded government contracts to the following companies, and the CEOs of these companies have contributed more than \$48,000 in cash and services to Jim’s campaigns for State Representative.”⁹¹ One of these listed companies was Rehak Creative Services, owned by Robert Rehak.⁹²

Rehak sued Witt for defamation, “business disparagement; tortious interference with business relationships and prospective business opportunities; intentional infliction of emotional distress; civil conspiracy; conversion; and misappropriation.”⁹³ Rehak specifically objected to Witt’s websites using the words “rewarding,” “ripping off,” and “bilking.”⁹⁴ He argued that these words juxtaposed the history of Rehak Creative’ Services contracts with Westchase District against Rehak’s political contributions to Murphy, leading to the false impression that Rehak was attempting to “gain[] influence over an elected official to obtain work, to steal and cheat taxpayers, and to help the elected official break the law.”⁹⁵

The trial court granted a motion by Witt to dismiss Rehak’s claims under the Texas anti-SLAPP statute.⁹⁶ The Texas Court of Appeals affirmed the trial court’s ruling and classified Rehak’s lawsuit as a

89. *Id.* at 720–21.

90. *Id.* at 721.

91. *Id.* at 721.

92. *Id.* at 722.

93. *Id.*

94. *Id.* at 729.

95. *Id.*

96. *Id.* at 723.

SLAPP suit.⁹⁷ A sizeable portion of the analysis of the defamation claim focused on the doctrine of rhetorical hyperbole.⁹⁸

The appeals court reasoned: “Viewing the challenged statements as a whole and in context, we conclude that a person of ordinary intelligence would perceive these words as nothing more than rhetorical hyperbole.”⁹⁹ The court explained that, given the statement’s tone and context, an “ordinarily intelligent” individual would not take the vigorous criticisms “at face value.”¹⁰⁰ Finally, the appeals court noted that “[t]he ordinary reader would understand that Witt’s vigorous criticism targeted the incumbent elected official she hoped to unseat in the primary—not Rehak.”¹⁰¹

Another California appeals court applied the doctrine of rhetorical hyperbole to shield a defendant in a case that arose out of a political campaign.¹⁰² The case involved two candidates for the California assembly, James E. Reed and James Gallagher.¹⁰³ Toward the end of the campaign, Gallagher ran a television ad that referred to Reed as an “unscrupulous lawyer.”¹⁰⁴ The ad read:

Jim Reed has launched a negative and misleading campaign, but just who is Jim Reed? Legal records show that Reed is an unscrupulous lawyer who was sued for negligence, fraud and financial elder abuse. Reed’s even been ordered to pay back fees he improperly collected from an elderly client. His victim said about Reed, ‘He saw a naïve widow and took advantage of me, raked me over the coals.’ Jim Reed. Not our values.¹⁰⁵

After Reed lost the election, he sued Gallagher for defamation. Reed challenged four express and implied statements in the political campaign ad: “(1) that legal records show Reed is an ‘unscrupulous lawyer,’ (2) that Reed had been ordered to pay back fees he improperly collected from an elderly client, (3) that one of the documents in the ad is an order directing Reed to repay fees, and (4) that Reed is a ‘crook.’”¹⁰⁶

97. *Id.* at 719.

98. *Id.* at 729–30.

99. *Id.* at 729.

100. *Id.* at 730.

101. *Id.* at 731.

102. Reed v. Gallagher, 204 Cal. Rptr. 3d 178, 188 (Ct. App. 2016).

103. *Id.* at 181.

104. *Id.*

105. *Id.* at 182.

106. *Id.*

Gallagher responded by filing a motion to dismiss under California's anti-SLAPP law.¹⁰⁷ The appeals court determined that the characterizations of Reed as an "unscrupulous lawyer" and "a crook" are classic rhetorical hyperbole, not a provable false statement of fact.¹⁰⁸ The court also emphasized the context of the political campaign in reaching its determination: "Here, the challenged statement was made during the heat of a political campaign, a context in which the audience would naturally anticipate the use of rhetorical hyperbole."¹⁰⁹

The defamation lawsuits against Trump, Witt, and Gallagher all arose out of statements made in the heat of a political debate or a political campaign. The challenged statements in each of these cases used provocative language. All three reviewing courts recognized that such provocative language is a form of rhetorical hyperbole.

These cases all show that the doctrine of rhetorical hyperbole is a significant hurdle in online defamation cases arising out of political campaigns. In the words of one court "Hyperbole, distortion, invective, and tirades are as much a part of American politics as kissing babies."¹¹⁰

CONCLUSION

Online speech that exaggerates, distorts, and paints a less than complete picture is a problem. Such speech has become a "vast breeding ground for . . . defamation."¹¹¹ Defamation law serves a very important purpose in protecting persons from reputation harm. In the words of Justice Potter Stewart, it "reflects no more than our basic concept of the essential dignity and worth of every human being."¹¹² In the social media age, speech has exploded, including defamation. However, the prevalence of anti-SLAPP laws, the judicial protections afforded to political speech, and the defense of rhetorical hyperbole all make it very difficult to recover for defamation arising out of social media posts during political campaigns.

Many defamation suits arising out of political campaigns will be targeted as SLAPP suits. Particularly in those jurisdictions that have

107. *Id.* at 181.

108. *Id.* at 190–91.

109. *Id.* at 191.

110. *Beilenson v. Superior Court*, 52 Cal. Rptr. 2d 357, 364 (Ct. App. 1996).

111. Heidi Frostestad Kuehl, *Free Speech and Defamation in an Era of Social Media: An Analysis of Federal and Illinois Norms in the Context of Anonymous Online Defamers*, N. ILL. U. L. REV., Summer 2016, at 28, 31.

112. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

broad coverage under their anti-SLAPP statutes, such as California and Tennessee, defamation suits face an uphill climb. Second, history and tradition demonstrate that political campaigns are a precursor to the rough-and-tumble world of a mixed martial arts or no-holds-barred type contest. Closely related to history and tradition is the strong First Amendment principle that political speech receives the greatest amount of protection. Furthermore, the doctrine of rhetorical hyperbole will protect much loose, figurative, and exaggerated language that often characterizes political campaign speech.

As one court wrote over two decades ago, “The overwhelming weight of authority is that campaign rhetoric is protected speech and, as such, recovery by a candidate is highly unusual.”¹¹³ Political campaigns often produce uncivil, unpleasant and even repugnant dialogue. But, the First Amendment often protects such unsavory expression.

113. *Beilenson*, 52 Cal. Rptr. 2d at 365.