In (Partial) Defense of Internet Trolls: Advocating a Flexible Summary Judgment Standard before Unmasking Anonymous Commentators Accused of Defamation

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Some of our nation's great political commentaries, from *The Federalist Papers,* to *Huckleberry Finn,* up to *Primary Colors*, have demanded anonymity of their authors. Today's Internet trolls may lack the gravitas and sophistication of Publius, Mark Twain, and Anonymous – don't most of us – but, at least on political topics, they are descendants of that tradition (though more unruly step-children than royal bloodline). While their content and tone may not betray it, today's digital troll owes his or her origins to yesterday's pamphleteer. Which is why a recent decision from the Illinois Supreme Court should give us pause.[1]

The Supreme Court of Illinois' *Hadley* Decision

Bill Hadley was the subject of discussions in the online comments section of a December 2011 article in the *Freeport Journal Standard*.[2] These comments were not flattering; they rarely are in such forums.[3] In response to an article entitled "Hadley returns to county politics. Candidate stresses fiscal responsibility," an online reader, using the profile "Fuboy" wrote that Bill Hadley was "a Sandusky waiting to be exposed. Check out the view he has of Empire [Elementary School] from his front door."[4] Fuboy also asked if anyone knew "the tale of Hadley's suicide attempt."[5]

Shortly after Fuboy posted these comments, Hadley filed suit for defamation against Gatehouse Media, the *Freeport Journal Standard*'s parent company, in an effort to locate Fuboy.[6] Gatehouse provided Hadley with the IP address behind the comments as well as Fuboy's internet service provider, Comcast Cable Communications ("Comcast").[7] After a number of procedural turns, Hadley filed a defamation case against Fuboy and issued a subpoena to Comcast seeking Fuboy's identity.[8] In response to guidance from the Stephenson County Circuit Court, Hadley filed an amended complaint, in which he asserted a cause of action for defamation against Fuboy (Count I) and asserted a cause of action under Illinois Supreme Court Rule 224 against Comcast (Count II).[9] Rule 224 provides plaintiffs a mechanism for identifying potential defendants before commencing suit.[10]

To be entitled to relief under Rule 224, the circuit court found that Hadley merely needed to allege sufficient facts to withstand a motion to dismiss.[11] The circuit court concluded that Hadley's defamation claim would survive a motion to dismiss, finding that that Fuboy's "Sandusky" comments obviously referred to the disgraced Jerry Sandusky, imputed the commission of a crime to Hadley, were not susceptible to an innocent construction, and could reasonably be interpreted as stating an actual fact.[12] The Appellate Court of Illinois affirmed.[13]

The Supreme Court of Illinois affirmed the appellate court's judgment.[14] In doing so, it came to two separate conclusions: (1) the motion to dismiss standard was the proper standard for evaluating whether a plaintiff has satisfied Rule 224's requirements in the defamation context; and (2) looking to this standard, Hadley had stated a claim for defamation.[15] According to the Illinois Supreme Court, the motion to dismiss standard was sufficient to "balance the potential plaintiff's right to redress for unprotected defamatory language against the danger of setting a standard for disclosure that is so low that it effectively chills or eliminates the right to speak anonymously . . ."[16] Hadley met this standard because he adequately alleged that Fuboy made a false statement, published the statement, and caused him damages.[17]

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The court concluded that Fuboy's statements did not fall within the opinion or rhetoric exception.[18] Looking to three factors – "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or

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social context signals that it has factual content" – the court found that Fuboy's Sandusky statement could reasonably be considered an assertion of fact and not a constitutionally permissible opinion.[19] "[W]hile the Internet is susceptible to hyperbole, exaggerations, and rhetoric . . . nothing in the context or forum of the Freeport Journal Standard's website [] suggest[ed] that Fuboy's allegation could not reasonably be interpreted as stating an actual fact."[20] Thus, the court held Hadley's complaint stated a claim for defamation and his Rule 224 action could proceed.[21]

Hadley Departs from *Dendrite* and *Cahill* and Creates a Test that is Too Lax

The First Amendment protects various forms of speech and expression, but it does not protect defamatory speech.[22] Faced with a defamation claim, courts must decide where to strike the balance between the right to free speech and the right to safeguard one's reputation.[23] *Hadley* is not the first case to decide how best to strike this balance.[24] In *Dendrite*, the New Jersey intermediate appellate court established a four-part test for determining whether to compel disclosure of a speaker's identity.[25] First, the plaintiff must make an effort to notify the anonymous poster that he or she is the subject of a subpoena or similar disclosure order.[26] Second, the plaintiff must identify the specific statements that are alleged to be actionable.[27] Third, the plaintiff must produce sufficient evidence to state a prima facie cause of action.[28] Fourth, the court must balance the strength of that prima facie case against the defendant's First Amendment right to speak anonymously.[29] In *Cahill*, the Delaware Supreme Court modified the *Dendrite* test, looking to only the first and third factors.[30] Under *Cahill*, an allegedly defamed plaintiff must "make reasonable efforts to notify the defendant and [to] satisfy the summary judgment standard."[31]

To date, "[m]ost federal and state courts to consider [what standard to apply] have adopted some form of the *Dendrite* and *Cahill* tests."[32] But there are several outliers – *Hadley* among them.[33] The *Hadley* decision is particularly important because it appears to be only the second instance of a state supreme court applying a motion to dismiss standard to speech concerning a political candidate. In *Lassa*, the Wisconsin Supreme Court determined that "requiring the circuit court to decide a motion to dismiss before compelling disclosure and imposing sanctions best addresses the concerns expressed in *Cahill*."[34] This decision found support in Wisconsin's statutory requirement that libel and slander claims be pled with particularity.[35]

Although the lines on the standards spectrum may blur,[36] the case law establishes four levels of evidentiary showings for plaintiffs seeking the identity of their online tormentors:

> (1) requiring a good faith basis that the plaintiff was the victim of actionable conduct, (2) requiring a party to show that its claim can survive a motion to dismiss, (3) requiring a prima facie showing that actionable conduct occurred, and (4) requiring a plaintiff to survive a hypothetical motion for summary judgment.[37]

As these standards go, *Hadley* represents a victory in the fight against Internet trolls. The question, however, is whether this is a victory that deserves to be celebrated or whether *Hadley* is an unnecessary effort (and yet another one in Illinois[38]) to anesthetize our political discussions.

The motion to dismiss standard – particularly in states where notice is pleading is all that is required – sets the bar far too low, allowing plaintiffs to allege only the bare elements of a claim to defeat a defendant's constitutional right to anonymous speech.[39] But even in a fact-pleading state like Illinois, the motion to dismiss standard veers too far and swallows too much speech. Take for example, not Fuboy's comments, but comments that might be made about our current president from residents in his home state. A birther who writes that "President Obama was born in Kenya," or a rival who posts that Obama's classmates "never saw him [and] don't know who his is"[40] may be guilty of naiveté or delusion, but should not be guilty of defamation. Yet, such statements could easily be alleged to be false, the subject of unprivileged publication, and of having caused damages, surviving any motion to dismiss.[41] Nor would such statements be a privileged opinion, for each statement has a precise meaning, is verifiable, and does not belong to any literary expression.[42]

Fuboy's comments are not a sign of the Internet times. Our political landscape has long been littered with allegedly defamatory comments.[43] The Federalists spread rumors that Thomas Jefferson swindled his legal clients, was a godless atheist, was a coward during the Revolutionary War, and slept with slaves at his home in Monticello.[44] The Republicans claimed that John Adams and running mate Charles Pinckney shared a total of four mistresses "all imported from England," and that Andrew Jackson's wife, Rachel, "was a whore and a . . . wench, given to open and notorious lewdness."[45] Congressman Davy Crocket accused Martin Van Buren of dressing up in women's clothing.[46] There were rumors – substantiated nearly ninety years later – that Warren Harding had sired a love child.[47]

Because the disclosure of a speaker's identity is a harm without a remedy, the First Amendment requires more than a motion to dismiss standard.[48] "The good faith test and the similarly lax motion to dismiss test may needlessly strip defendants of anonymity in situations

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where there is no substantial evidence of wrongdoing, effectively giving little or no First Amendment protection to that anonymity."[49] This concern is particularly acute since in many anonymous defamation cases the "unmasking itself may well be the 'real' remedy sought . . ."[50] Because unmasking may be the real remedy,

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"it is important to make [the] standard difficult enough [so] that only those with legitimate claims may unmask the anonymous speaker."[51] If the standard is too lax, the process may be easily abused by those individuals whose true goals are "extra-judicial self-help remedies" such as "revenge or retribution."[52] "A defamation plaintiff, particularly a public figure, obtains a very important form of relief by unmasking the identity of his anonymous critics."[53]

The impact of this threat applies beyond the actual speaker.[54] The unmasking of one dissenting voice chills the voices of countless others. "The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all."[55] "Merely *alleging* facts that would state a claim based on speech not protected by the First Amendment does little to protect the rights of those speaking anonymously."[56] Courts have, therefore, recognized that this "'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked."[57] *Hadley*'s motion to dismiss standard is not stringent enough.

Hadley Strikes the Wrong Balance Because Anonymous, Political Discussions Deserve the Greatest Protection

Hadley can be faulted for applying too lax a standard. *Hadley*, and many other cases, can also be faulted for announcing that only one, fixed standard should govern. As noted above, there are four standards that have been suggested.[58] But focusing on these four standards is to view the question through too simple a lens.[59]

The nature of the speech – whether it be commercial or political – "should be a driving force in choosing a standard by which to balance the rights of anonymous speakers in discovery disputes."[60] "[W]hen addressing a defamation plaintiff's motion to unmask an anonymous defendant, the court must consider the nature of the speech at issue when determining the evidentiary standard to apply."[61] A particular test or standard may need to be modified depending on the type of injury alleged or the type of speech involved,[62] for in the First Amendment arena, "one size does not necessarily fit all."[63]

Hadley concerned speech (albeit speech that stated a claim for defamation) about a political candidate.[64] This is speech at the core of the First Amendment.[65] The discussion of public issues and debate over candidates' qualifications are integral to our government.[66] The same is true of the right to comment anonymously about these issues.[67] In our system of government, "[a]nonymity [offers] a shield from the tyranny of the majority."[68] And while the right to remain anonymous may be abused when used to shield fraudulent conduct, our society must also accept that "political speech by its nature will sometimes have unpalatable consequences, for our society has chosen to accord greater weight to the value of free speech than to the dangers of its misuse.[69]

Fuboy and other so-called Internet trolls may be a far cry from Hamilton and Twain, but, then again, most of us are. Few among us possess the wit and eloquence of these great writers. But political commentary, both low and high brow, falls within the protections of the First Amendment.[70] Fuboy's comments concerned his opinion of Bill Hadley – a political candidate –and he or she should be able to convey this political opinion in a caustic and unpleasant manner if that is the manner in which he or she chooses.[71] The First Amendment encourages this type of robust debate, which can frequently be "critical of those who hold public office. . ."[72] And it does so because political candidates, unlike everyday citizens, have the resources and ability to respond to such pointed attacks.[73]

The Court of Appeals of Arizona has best captured the need to combine the summary judgment standard found in *Cahill* with the First Amendment's varying treatment of the different categories of speech.[74] Under *Mobilisa*, in order to compel discovery of an anonymous internet speaker's identity,

> the requesting party must show: (1) the speaker has been given adequate notice and a reasonable opportunity to respond to the discovery request, (2) the requesting party's cause of action could survive a motion for summary judgment on elements not dependent on the speaker's identity, and (3) a balance of the parties' competing interests favors disclosure.[75]

This test, which finally accounts for the difference between commercial, political, and other forms of speech, should be the test adopted for unveiling anonymous speakers.[76]

Internet Hyperbole Should Be Viewed As Such

Courts have recognized that the Internet promotes a "looser, more relaxed communication style" with an

ethos that "anything goes."[77] Internet users are able to engage in informal debate and criticism, "leading many to substitute gossip for accurate reporting and often to adopt a provocative, even combative tone."[78] Hyperbole and exaggeration are often the norm, with venting as common as careful and considered debate.[79] Online discussions, therefore, more often resemble "a vehicle for emotional catharsis than a forum for the rapid exchange of information and ideas."[80]

Within the Internet context, "juvenile name-calling cannot reasonably be read as stating actual facts."[81] While a user's language may be "unquestionably vulgar and insulting," the proper perspective indicates that the author is not imparting knowledge of actual facts to the reader.[82] Instead, the author is expressing an opinion – and often a vulgar one.[83] The United States Supreme Court has recognized as much, entreating courts to not "underestimate the common man."[84] "People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message."[85] Few readers are likely to view such anonymous postings as assertions of fact.[86]

This should have been the case with Fuboy's comments. The language in *Hadley*, while crude, insulting, and offensive, did not convey any actual facts.[87] "No reasonable reader would have taken [Fuboy's] post seriously; it obviously was intended as a means of ridiculing [Hadley]."[88] Viewed in context, Fuboy's comments were no more than an expression of his or her opinions of a political candidate.[89] As such, they are protected by the First Amendment.[90]

For Better or Worse, The Internet is Our New Public Forum

Speech on the Internet is a "unique democratizing medium," because cyberspace disguises a user's race, class, and age.[91] Or as a *New Yorker* cartoon once put it: "On the Internet, nobody knows you're a dog."[92] This new medium deserves the same vaunted treatment that the First Amendment has afforded other public mediums.

No matter how hyperbolic or unsubstantiated, political discussions should not be stymied by fear of civil prosecution. Our Nation has long recognized that the solution to problematic speech is more speech, not less.[93] This is easily accomplished on the Internet, where a potential plaintiff can "generally set the record straight."[94] "[A] person wronged by statements of an anonymous poster. . . can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements."[95] This unique feature of online communication "allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of" any allegedly defamatory statements made online.[96]

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More speech also promotes the general rule that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[97] The best response to a troll's comments is not to reinforce them through litigation, but to weaken them through additional discourse or no discourse at all. We should remain faithful that ideas of merit will eventually take root and that falsehoods will meet their winter and wither on the vine.

Under the First Amendment, our "society accords greater weight to the value of free speech than to the dangers of its misuse."[98] That is the bargain our Constitution has made. We must, therefore, accept that if there is to be an "open and vigorous expression of views in public and private conversation," that "some false statements are inevitable. . ."[99] With modern technology, it should come as no surprise that these statements will be increasingly made online, our modern citizenry having transitioned from the physical pamphlet to the digital one.[100]

Our new, electronic pamphleteers deserve the same rights and protections as their forebears. On topics of political consequence, policing speech, even anonymous speech, is anathema to the Constitution and our history and system of government.[101] Our new, electronic pamphleteers – even the so-called trolls among them – deserve a flexible summary judgment standard before being pulled into court from underneath their digital bridge, and their online, political musings deserve to be treated as constitutionally protected opinions.

Endnotes

1. *Hadley v. Doe*, 34 N.E.3d 549 (Ill. 2015).
2. *Id.* at 552.
3. *See* Editorial: No comments. An experiment in elevating the conversation, *St. Louis Post-Dispatch* (Dec. 8, 2014) (noting that for two months, the *Post-Dispatch* would be turning off the comment function for all of the content in its opinion section in response to the "vile and racist comments" relating to the events in Ferguson); *see also Krinsky v. Doe 6,* 72 Cal. Rptr. 3d 231, 237-38 (Cal. Ct. App. 2008) (euphemistically noting that the relative anonymity of the Internet "promotes a looser, more relaxed communication style.").
4. *Hadley*, 34 N.E.3d at 552.
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 553.
9. *Id.*
10. *Id.*; *see also* Ill. S. Ct. R. 224(a)(1)(i) ("A person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery.").
11. *Hadley*, 34 N.E.3d at 553 (citing Ill. R. Civ. P. 2-615).
12. *Id.*
13. *Hadley v. Doe*, 12 N.E.3d 75 (Ill. App. Ct. 2014).
14. *Hadley*, 34 N.E.3d at 552.
15. *Id.* at 557-60.

16. *Id.* at 556.

17. *See id.* at 560; *see also id.* at 557 (detailing the elements of a defamation claim).

18. *See id.* at 560 ("[A] defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact."); *see also Seitz-Partridge v. Loyola Univ. of Chicago*, 987 N.E.2d 34, 43 (Ill. App. Ct. 2013) ("In defamation actions, statements that are capable of being proven true or false are actionable, whereas opinions are not.").

19. *Hadley,* 34 N.E.3d at 559-60; *see also Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380, 392 (Ill. App. Ct. 2011) (noting that the First Amendment protects statements that cannot be reasonably construed as stating actual facts).

20. *Hadley*, 34 N.E.3d at 559.

21. *Id.*

22. *Thomson v. Doe*, 356 P.3d 727, 730 (Wash. Ct. App. 2015) (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

23. *Id.*

24. *See, e.g., In re Anonymous Online Speakers*, 661 F.3d 1168, 1177 (9th Cir. 2011) (discussing the various standards); *Thomson*, 356 P.3d at 732 n.5 (same).

25. *Dendrite Int'l v. Doe No. 3*, 775 A.2d 756, 759-60 (N.J. Super. Ct. App. Div. 2001).

26. *Id.* at 760.

27. *Id.*

28. *Id.*

29. *Id.* at 760-61.

30. *Doe v. Cahill*, 884 A.2d 451, 461 (Del. 2005).

31. *Id.*

32. *Thomson*, 356 P.3d at 732 n.7 (collecting cases); *see also Best W. Int'l, Inc. v. Doe*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695, at *4 (D. Ariz. July 25, 2006) ("Given the significant First Amendment interest at stake, the Court agrees with the Delaware Supreme Court in *Cahill,* and concludes that a summary judgment standard should be satisfied before BWI can discover the identities of the John Doe Defendants.").

33. *See Hadley*, 34 N.E.3d at 556 (rejecting "the *Dendrite-Cahill* summary judgment standard."); *see also Yelp, Inc. v. Hadeed Carpet Cleaning, Inc.,* 752 S.E.2d 554, 562 (Va. Ct. App. 2014) (applying a good faith test based on Va. Code Ann. § 8.01-407.1), *vacated on other grounds,* 770 S.E.2d 440 (Va. 2015).

34. *Lassa v. Rongstad*, 718 N.W.2d 673, 687 (Wis. 2006).

35. *Id.* (citing Wis. Stat. §802.03(6)).

36. *See Krinsky*, 72 Cal. Rptr. 3d at 244 (noting that it is "potentially confusing to attach a procedural label, whether summary judgment or motion to dismiss, to the showing required of a plaintiff seeking the identity of an anonymous speaker on the Internet.").

37. *Thomson*, 356 P.3d at 732 n.5.

38. Illinois is no stranger to this issue. In April 2014, multiple police officers raided Jonathan Daniel's home, after Daniel created a parody twitter account that mocked the mayor of Peoria, Illinois. *See* Ben Mathis-Lilley, *City of Peoria Settles with Short-Order Cook Whose House It Raided Over Parody Twitter Account,* Slate (Sept. 4, 2015), available at http://www.slate.com/blogs/the_slatest/2015/09/04/peoria_mayor_parody_twitter_account_jokes_lead_to_raid_which_leads_to_settlement.html (last visited Jan. 11, 2016).

39. *Thomson*, 356 P.3d at 734 (noting that the motion to dismiss standard is "insufficient to protect the speaker's First Amendment right to anonymous speech."); *Best W. Int'l,* 2006 WL 2091695, at *5 ("Nor, given modern notice pleading standards, would BWI's complaint likely be subject to a motion to dismiss."); *but see Hadley*, 34 N.E.3d at 556-57 (expressing no concerns with the motion to dismiss standard because "Illinois is a fact pleading state"); *Lassa*, 718 N.W.2d at 687 (noting that Wisconsin's motion to dismiss standard approximates the *Cahill* standard).

40. This statement was not actually made anonymously. *See* Robert Farley, *Donald Trump Says People Who Went to School with Obama Never Saw Him*, Politifact (Feb. 14, 2011), available at http://www.politifact.com/truth-o-meter/statements/2011/feb/14/donald-trump/donald-trump-says-people-who-went-school-obama-nev/ (last visited Jan. 11, 2016).

41. *See Hadley*, 34 N.E.3d at 557.

42. *See id.* at 559.

43. *See generally* Joseph Cummins, *Anything for a Vote: Dirty Tricks, Cheap Shots* (Quirk Books 2015).

44. *Id.* at 27; *see also* Amber Phillips, *Warren Harding and 5 Other Presidents Who Have Faced 'Love Child' Questions*, Wash. Post (Aug. 13, 2015) (noting that accusations that Jefferson had fathered children with one of his slaves, Sally Hemings, arose during his first term in office).

45. Joseph Cummins, *Anything for a Vote: Dirty Tricks, Cheap Shots* at 31, 52.

46. *Id.* at 66 (noting that Van Buren was "laced up in corsets, such as women in a town wear," and that but for his "large and gray whiskers," it would have been difficult to determine if he was a man or a woman).

47. Peter Baker, *DNA Is Said to Solve a Mystery of Warren Harding's Love Life*, N.Y. Times (Aug. 12, 2015).

48. *Thomson,* 356 P.3d at 734*; see also Cahill*, 884 A.2d at 457 ("[S]etting the standard too low will chill potential posters from exercising their First Amendment right to speak anonymously.").

49. *Solers, Inc. v. Doe*, 977 A.2d 941, 952 (D.C. 2009).

50. *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 724-25 (Ariz. Ct. App. 2007) (Barker, J., dissenting).

51. *Id.*

52. *Cahill,* 884 A.2d at 457.

53. *Id*.

54. *See id.*

55. *Id.; see also Stone*, 961 N.E.2d at 394 ("Encouraging those easily offended by online commentary to sue to find the name of their 'tormenters' would surely lead to unnecessary litigation and would also have a chilling effect on the many citizens who choose to post anonymously" in online forums) (applying a motion to dismiss standard).

56. *Mobilisa*, 170 P.3d at 725.

57. *Cahill*, 884 A.2d at 457.

58. *See Thomson*, 356 P.3d at 732 n.5.

59. *See id.* at 733.

60. *In re Anonymous Online Speakers*, 661 F.3d at 1177.

61. *Thomson,* 356 P.3d at 734 (noting that the evidentiary standard at issue "should match the First Amendment interest at play" and applying a prima facie standard instead of a summary judgment standard because political speech was not involved); *Swartz v. Doe*, No. 08C-431, 2009 WL 7023070 (Tenn. Cir. Ct. Oct. 8, 2009) (holding that a "higher-burden standard" was more appropriate to "properly balance Defendant's free speech interests" because the online statements concerned expressive speech).

62. *Thomson*, 356 P.3d at 734; *Solers*, 977 A.2d at 952; *see also Mobilisa*, 170 P.3d at 720 ("[W]ithout a balancing step, the superior court would not be able to consider factors such as the type of speech involved . . . .").

63. *Solers*, 977 A.2d at 952.

64. *Hadley,* 34 N.E.3d at 552 (noting

that the underlying article discussed Bill Hadley's decision to seek election to the county board of Stephenson County).

65. *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009) ("Political speech is core First Amendment speech, critical to the functioning of our democratic system."); *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088, 1092-93 (W.D. Wash. 2001) ("When speech touches on matters of public political life, such as debate over the qualifications of candidates, discussion of governmental or political affairs, discussion of political campaigns, and advocacy of controversial points of view, such speech has been described as the 'core' or 'essence' of the First Amendment."); *Doe v. Coleman*, 436 S.W.3d 207, 209 (Ky. Ct. App. 2014) ("Political speech directed toward public officials is at the pinnacle of protected speech under the First Amendment.").

66. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995).

67. *See id.*

68. *Id.* at 347.

69. *Id.*

70. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988) (characterizing *Hustler's* parody advertisement as "doubtless gross and repugnant in the eyes of most . . . .").

71. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open," and discussions of this nature may "well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

72. *Coleman*, 436 S.W.3d at 209-10 (quoting *Hustler Magazine*, 485 U.S. at 51).

73. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974) ("Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then private individuals normally enjoy.").

74. *Mobilisa*, 170 P.3d at 721.

75. *Id.*

76. In a dissent, Judge Barker characterized this standard as a "summary judgment-plus standard." *Mobilisa*, 170 P.3d at 725 (Barker, J., dissenting). This phrase is ambiguous. The standard is summary judgment plus an additional consideration. It is not a standard slightly more stringent than summary judgment. In fact, if commercial speech is involved (rather than political speech), the *Mobilisa* standard will be more lenient than summary judgment.

77. *Krinsky*, 72 Cal. Rptr. 3d at 237-38.

78. *Id.* at 238.

79. *Id.*

80. *Id.*

81. *Id.* at 249.

82. *Id.*

83. *See Rocker Management LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, at *2 (N.D. Cal. May 29, 2003) (noting that readers are unlikely to view vulgar and hyperbolic messages posted anonymously as assertions of fact); *Cahill*, 884 A.2d at 465 ("Blogs and chat rooms tend to be vehicles for the expression of opinions; by their very nature, they are not a source of facts or data upon which a reasonable person would rely.").

84. *McIntyre*, 514 U.S. at 348 n.11.

85. *Id.*

86. *Cahill*, 884 A.2d at 465.

87. *See Krinsky*, 72 Cal. Rptr. 3d at 250 ("[While Doe's] insulting, and often disgusting remarks understandably offended plaintiff and possibly many other readers . . . [this] is not a sufficient reason for suppressing it."); *see also Cahill*, 884 A.2d at 466 ("A reasonable reader would not view the blanket, unexplained statements at issue as 'facts' when placed on such an open and uncontrolled forum.") (quoting *SPX Corp. v. Doe*, 253 F. Supp. 2d 974, 981 (N.D. Ohio 2003)).

88. *Krinsky,* 72 Cal. Rptr. 3d at 249; *but see Dibble v. Avrich*, No. 14-CIV-61264, 2014 WL 5305468, at *4 (S.D. Fla. Oct. 15, 2014) ("In our age of anonymous internet trolls and the often-uninformed echo-chamber of the blogosphere, maybe no reasonable reader would take Defendant's statements as asserting facts rather than just one more outspewing of thoughtless rhetoric. But the Court is not willing to say, as a matter of law, that Defendant's insults are incapable of being interpreted as false facts.").

89. *Cahill*, 884 A.2d at 466 ("When one views allegedly defamatory statements in context – both the immediate context and the broader social context – it becomes apparent that many of the allegedly defamatory statements cannot be interpreted as stating actual facts, but instead are either subjective speculation or merely rhetorical hyperbole.").

90. *Hadley*, 34 N.E.3d at 558 ("[I]f a statement is defamatory *per se* . . . it may still enjoy constitutional protection as an expression of opinion."); *see also Krinsky,* 72 Cal. Rptr. 3d at 250 ("If it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection."); *Cahill*, 884 A.2d at 467 ("Read in the context of an internet blog, these statements did not imply any assertions of underlying objective facts . . . The statements are, therefore, incapable of a defamatory meaning.").

91. *Cahill*, 884 A.2d at 456-57; *see also 2TheMart.com*, 140 F. Supp. 2d at 1097 ("The Internet is a truly democratic forum for communication.").

92. Peter Steiner, *New Yorker* (July 5, 1993).

93. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010) ("[I]t is our law and our tradition that more speech, not less, is the governing rule.").

94. *Cahill,* 884 A.2d at 464.

95. *Id.*

96. *Id.*

97. *McIntyre*, 514 U.S. at 348 n.11.

98. *See Cahill*, 884 A.2d at 456; *see also Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 246, 258 (2002) (declaring portions of the Child Pornography Prevention Act unconstitutional because the Act swept too much permissible speech – speech of "serious literary, artistic, political, or scientific value" – within its prohibitions).

99. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

100. *See Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997) ("Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.").

101. *See 2TheMart.com*, 140 F. Supp. 2d at 1092 ("Anonymous speech is a great tradition that is woven into the fabric of this nation's history [and this] right to speak anonymously extends to speech via the Internet."); *see also Stone*, 961 N.E.2d at 394 ("Putting publishers and website hosts in the position of being a 'cybernanny' is a noxious concept that offends our country's long history of protecting anonymous speech.").