IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

COURTNEY GOODSON and COURTNEY GOODSON CAMPAIGN — PLAINTIFFS

v. Case No. 4:18-cv-791

REPUBLICAN STATE LEADERSHIP COMMITTEE -- JUDICIAL FAIRNESS INITIATIVE — DEFENDANT

REPUBLICAN STATE LEADERSHIP COMMITTEE – JUDICIAL FAIRNESS INITIATIVE'S BENCH BRIEF IN OPPOSITION TO REQUEST FOR PRELIMINARY INJUNCTION

This is Justice Courtney Goodson and the Courtney Goodson Campaign's (collectively, "Goodson") fourth attempt to censor opposition to her campaign for reelection to the Arkansas Supreme Court. As a member of the Arkansas Supreme Court, Justice Goodson must know that the relief she seeks is patently unconstitutional. The Court should reject Goodson's invitation to trod over the First Amendment.

I. Background

The Republican State Leadership Committee – Judicial Fairness Initiative ("RSLC-JFI") is an Independent Expenditure Committee committed to supporting conservative candidates in state judicial elections. The RSLC-JFI opposes Justice Goodson's campaign for re-election to the Arkansas Supreme Court, and it intends to encourage voters in Arkansas to vote against Justice Goodson in the upcoming election scheduled to be held on November 6, 2018.

Goodson claims that a campaign advertisement running on television and a campaign mailer produced by RSLC-JFI are defamatory. The television advertisement states "Courtney Goodson took a $50,000 trip to Italy on a donor's yacht. And hundreds of thousands in contributions from law firms [who] go before her Court. Huge gifts from donors. How can she be

fair? Reject Scandal. Reject Courtney Goodson" (Dkt. No. 2, ¶ 3). The mailer, attached as Exhibit A to Goodson's verified complaint and request for preliminary injunction, includes the following statement:

> Most Arkansans don't get free $50,000 vacations to Italy paid for by trial attorneys, but Supreme Court Justice Courtney Goodson did. An ultra-wealthy Arkansas trial lawyer and campaign donor paid for Courtney Goodson and her husband to go on an extended luxury vacation to Italy, including a cruise on a yacht owned by one of her corporate campaign contributors.
>
> Then, Goodson turned to Arkansas taxpayers to support her lavish lifestyle by asking for an additional $18,000 pay raise. Courtney Goodson was already paid almost $150,000 a year when she received a $16,000 pay raise in 2015, making her one of the highest paid officials in Arkansas with a salary even bigger than the Governor's. In 2017, Goodson requested another pay raise of $18,000.
>
> If Courtney Goodson gets lavish trips, what do the trial lawyers get from Courtney Goodson? On the Supreme Court, Goodson consistently sides with the trial lawyers, issuing legal opinions that make them millions more in their lawsuits.

(Dkt. No. 2, at 19).

Goodson takes issue with two assertions made in these advertisements. Regarding the advertisements' claims about gifts from trial lawyers, Goodson does not assert that any of the statements are false—nor could she—because the statements are indisputably true. Instead, Goodson argues the advertisements are "totally false by omission because Justice Goodson has recused from any case involving the donor of the trip to Italy and from any law firm which can possibly be tied to such contributions" (*Id.*, ¶ 3).

Regarding the requested $18,000 pay raise, Goodson does not claim that she never requested such a raise. Instead, Goodson argues that the campaign mailer is false because she did not personally request a raise, but rather Chief Justice Dan Kemp requested a $18,000 pay raise on behalf of every member of the Arkansas Supreme Court (including Justice Goodson) after being authorized to do so by a confidential vote of the Court (*Id.*, ¶ 25). Goodson argues that RSLC-JFI

is defaming her because there is no public information about whether Justice Goodson voted in favor of the requested pay raise, though she does not disclose her vote on the pay increase (*Id.*).

Goodson filed a verified complaint and request for a preliminary injunction in the Circuit Court for Pulaski County, Arkansas, on October 24, 2018 (Dkt. No. 2). RSCL-JFI filed a notice of removal on October 25.

II. The Preliminary Injunction Requested By Goodson Would Be An Unconstitutional Prior Restraint

The Court should deny the relief requested by Goodson, which cuts at speech at the heart of the First Amendment. Indeed, the constitutional guarantee of free speech "'has its fullest and most urgent application precisely to the conduct of campaigns for political office[,]'" because the "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (quoting *Monitor Patriot*, 401 U.S. at 272). Accordingly, campaign speech is afforded "the broadest protection" under the First Amendment. *Id.* at 14. This robust protection of speech is predicated on what the Honorable Learned Hand described as America's fundamental assumption "that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). "To many this is, and always will be, folly; but we have staked upon it our all." *Id.*

A. Preliminary Injunctions Silencing Speech Are Prior Restraints

Goodson seeks a preliminary injunction prohibiting future publication of this protected speech. The relief sought by Goodson would be a prior restraint. *See Alexander v. United States*, 509 U.S. 544, 550 (1993) ("The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such

communications are to occur.'") (quoting M. Nimmer, *Nimmer on Freedom of Speech* § 4.03, p. 4–14 (1984)). Indeed, the United States Supreme Court recognizes that "[t]emporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Id.*

Goodson appears to concede that the preliminary injunction she seeks would be a prior restraint (Dkt. No. 2, ¶ 22). To the extent Goodson makes no such concession, the Court should reject her arguments to the contrary. In a defamation case brought by a public figure, the Supreme Court found that a permanent injunction issued by a state trial court after a bench trial was a prior restraint. *See Tory v. Cochran*, 544 U.S. 734, 738 (2005). Furthermore, Justice Blackmon, writing for the Supreme Court, granted an emergency stay of a preliminary injunction entered by a state circuit court prohibiting CBS from airing a news story critical of a meat packing company, holding that the preliminary injunction was an unconstitutional prior restraint. *CBS, Inc. v. Davis*, 510 U.S. 1315, 1318 (1994) (Blackmun, J., in chambers). Noting that "a single Justice may stay a lower court order only under extraordinary circumstances," Justice Blackmon determined that a preliminary injunction silencing speech on a matter of public concern qualified as one of the rare cases justifying immediate intervention by a Supreme Court Justice. *Id.* at 1317. Justice Blackmon also concluded that damages, not the suppression of protected speech, would be the appropriate remedy for any violation of state law. *Id.* at 1318 ("If CBS has breached its state law obligations, the First Amendment requires that [plaintiff] remedy its harms through a damages proceeding rather than through suppression of protected speech.").

The Supreme Court's *Cochran* opinion and Justice Blackmon's decision to take the extraordinary step to stay a state court order in *Davis* establish that preliminary injunctions barring

speech on matters of public concern are prior restraints. Decisions from courts across the country bolster this conclusion.

The most recent analysis on the constitutionality of injunctions prohibiting speech comes from the First Circuit Court of Appeals, which concluded that an injunction prohibiting the republication of six statements, issued after a final adjudication that the statements were defamatory, was "a paradigmatic example of a prior restraint." *Sindi v. El-Moslimany*, 896 F.3d 1, 31 (1st Cir. 2018). Citing Supreme Court cases concerning obscenity, the First Circuit acknowledged that "an injunction against speech sometimes may pass constitutional testing if it follows an adjudication that the expression is unprotected, and the injunction itself is narrowly tailored to avoid censoring protected speech." *Id.*, at 32. However, the court noted "significant distinctions between obscenity and defamation that make injunctions of obscene communications less problematic in constitutional terms." *Id.*, at 33.

The First Circuit recognized that "works adjudged obscene . . . are immutable forms of expression[,]" meaning a "permanent injunction there could be carefully crafted to ensure that it applied only to the specific publications found obscene without exposing the bookseller to contempt sanctions for distributing other publications that might be protected under the First Amendment." *Id.* Conversely, "defamation is an inherently contextual tort" as "[w]ords that were false and spoken with actual malice on one occasion might be true on a different occasion or might be spoken without actual malice." *Id.* Injunctions intended to apply narrowly to defamatory language inherently cannot "make any allowance for contextual variation," meaning an injunction entered in a defamation case is far more likely to punish protected speech. *Id.* Accordingly, the First Circuit held that the permanent injunction violated the First Amendment. *Id.*, at 34.

The First Circuit Court of Appeals' recent opinion is consistent with decisions issued by numerous other federal circuit courts and state supreme courts. For example, the Seventh Circuit Court of Appeals found that preliminary injunctions in speech cases are unconstitutional prior restraints while also questioning, without resolving, the constitutionality of permanent injunctions entered after an adjudication on the merits. *McCarthy v. Fuller*, 810 F.3d 456, 462 (7th Cir. 2015) ("An injunction against defamatory statements, if permissible at all, must not through careless drafting forbid statements not yet determined to be defamatory, for by doing so it could restrict lawful expression."). The Texas Supreme Court went farther than the Seventh Circuit, holding that any injunction prohibiting future speech is a prior restraint. *See Kinney v. Barnes*, 443 S.W.3d 87, 93–94 (Tex. 2014) (concluding that all injunctions prohibiting future speech are prior restraints) (citing Erwin Chemerinsky, *Injunctions in Defamation Cases*, 57 Syracuse L. Rev. 157, 165 (2007)). The Idaho Supreme Court affirmed the dismissal of a complaint seeking a preliminary injunction in a defamation case, holding that the preliminary injunction, which would have enjoined speech criticizing public officials, would be an unconstitutional prior restraint. *Nampa Charter Sch., Inc. v. DeLaPaz*, 140 Idaho 23, 27, 89 P.3d 863, 867 (2004).

Some state and federal courts permit entry of *permanent* injunctions in defamation cases after a final adjudication that the statements to be enjoined are defamatory. However, no state supreme court or federal circuit court has upheld an injunction entered for an allegedly defamatory campaign advertisement. Furthermore, the overwhelming majority of these courts pointedly clarify that, while narrowly tailored permanent injunctions issued after an adjudication on the merits may be constitutional, preliminary injunctions are not. *See, e.g., Lothschuetz v. Carpenter*, 898 F.2d 1200, 1208–09 (6th Cir. 1990) (finding that a permanent injunction barring commercial speech against a non-public figure was constitutional but limiting "the application of such

injunction to the statements which have been found in this and prior proceedings to be false and libelous"); *Balboa Island Vill. Inn, Inc. v. Lemen*, 40 Cal. 4th 1141, 1155–56, 156 P.3d 339, 349 (2007) (holding that an injunction "issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression."); *Hill v. Petrotech Res. Corp.*, 325 S.W.3d 302, 309 (Ky. 2010) (same); *Retail Credit Co. v. Russell*, 234 Ga. 765, 779, 218 S.E.2d 54, 63 (1975) (same). The requested preliminary injunction would be a prior restraint.

B. The Requested Prior Restraint Does Not Survive Strict Scrutiny

A prior restraint is not unconstitutional *per se*, but there is a "heavy presumption against its constitutional validity." *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)). Prior restraints are subject to "the most exacting scrutiny" under the First Amendment. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 102 (1979) (collecting cases). A prior restraint must be "(1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White*, 536 U.S. 765, 775 (2002) (citing *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989)). A prior restraint entered in this case would not survive strict scrutiny.

Goodson contends, as she did in her appellee brief in *TEGNA v. Goodson*, CV-18-522 (Ark. Ct. App.), a case currently pending before the Arkansas Court of Appeals, that a prior restraint silencing speech critical of her fitness for office may survive strict scrutiny because it advances "the State's compelling interest in preserving public confidence in the integrity of the judiciary . . . through means narrowly tailored to avoid unnecessarily abridging speech" (Dkt. No. 2, ¶ 22). Goodson's theory is predicated on her extreme reading of *Williams-Yulee v. Florida Bar*, where the Supreme Court held that a state judicial canon prohibiting candidates for judicial office from

personally soliciting campaign contributions—but allowing such candidates to raise money through campaign committees—survived strict scrutiny. *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1672 (2015).

In *Williams-Yulee*, the Supreme Court recognized that states have a "compelling interest in preserving public confidence in the integrity of the judiciary." *Id.*, at 1666. The Court found that prohibiting personal solicitation intuitively advanced that interest, as "the public may lack confidence in a judge's ability to administer justice without fear or favor if he comes to office by asking for favors." *Id.* The Court determined that the canon was narrowly tailored because candidates remained able "to raise money through committees and to otherwise communicate their electoral messages in practically any way." *Id.*, at 1656.

The Supreme Court's holding in *Williams-Yulee* was quite limited. Recognizing that states have a compelling interest in protecting public confidence in the judiciary, the Court permitted a targeted burden on the First Amendment rights of judicial candidates for "speech in a political campaign that implicated purely ethical concerns, *i.e.*, a judicial candidate seeking favors." *Parker v. Judicial Inquiry Comm'n of Alabama*, 295 F. Supp. 3d 1292, 1304 (M.D. Ala. 2018). Furthermore, "[t]he link between the problem (asking for money) and the solution (restricting judicial candidates from personally engaging in 'money speech') was clear, and the slice of speech cut from the pie was narrow." *Id.* Even so, the Court's narrow decision was controversial: four justices dissented from the majority opinion.

Goodson apparently believes that under *Williams-Yulee*, the government may issue a prior restraint silencing criticism of a judicial candidate—and a sitting justice—in the name of protecting the public's confidence in judicial integrity. Goodson grossly misreads *Williams-Yulee*, and the Court should reject her argument.

First, Goodson conflates the integrity of the judiciary with her own reputation. The Supreme Court has long recognized that these interests are distinct. *See Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 841 (1978) (recognizing the state's "interest in protecting the reputation of its judges" and "its interest in maintaining the institutional integrity of its courts"). And while the Supreme Court acknowledges that a state has "an interest in protecting the good repute of its judges," it is "firmly established . . . that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" *Id.*, at 841-42 (quoting *Sullivan*, 376 U.S. at 272–273).

In this defamation case, Justice Goodson's character is at issue, not the judiciary's. The state simply does not have a sufficiently compelling interest to censor speech criticizing Justice Goodson. *Bridges v. State of Cal.*, 314 U.S. 252, 289 (1941) (Frankfurter, J. dissenting) ("Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions.").

Second, while the state has a compelling interest in preserving public confidence in the integrity of the judiciary as a whole, permitting prior restraints on speech at the heart of the First Amendment does not advance that interest. Indeed, it would likely have an inverse effect. *See id.* at 270 ("[A]n enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.").

The Supreme Court's decision in *Williams-Yulee* did not open the floodgates to censorship of public discourse regarding judges and judicial candidates. The majority in *Williams-Yulee* recognized that the state may impose a limited burden on *candidates* for judicial office for a specific type of speech that could cause the public to doubt the integrity of the bench. *See*

Williams-Yulee, 135 S. Ct. at 1667 ("In short, it is the regrettable but unavoidable appearance that judges who personally ask for money may diminish their integrity . . . ."). Some lower courts have interpreted *Williams-Yulee* to allow similar, targeted burdens on specific types of speech for judicial officers and candidates. However, these courts have not upheld comparable burdens on those not already in or running for judicial office.

Two decisions from the Ninth Circuit Court of Appeals regarding political endorsements of judicial candidates exemplify this distinction. The Ninth Circuit upheld a Montana judicial canon prohibiting *judicial candidates* from seeking or using political endorsements because "judges who personally ask for political endorsements may diminish the public's faith in the impartiality of the judiciary." *French v. Jones*, 876 F.3d 1228, 1237 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1598, 200 L. Ed. 2d 778 (2018). However, what was a permissible burden on *candidates* did not apply to the *public*. The Ninth Circuit struck down a similar Montana rule prohibiting political parties from publicly endorsing judicial candidates as violative of the First Amendment. *See Sanders Cty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 747 (9th Cir. 2012) ("Under a strict scrutiny standard, therefore, Montana lacks a compelling interest in forbidding political parties from endorsing judicial candidates."); *see also French*, 876 F.3d at 1231 n.2 (acknowledging, and distinguishing, *Sanders*). The Ninth Circuit recognized that while prohibiting judicial candidates from seeking political endorsements is narrowly tailored to serve a state's compelling interest in protecting public faith in the impartiality of the judiciary, censoring public commentary on individuals running for judicial office simply does not serve that same interest. *Id.*, at 746.

Goodson's requested preliminary injunction would not be a narrow limitation on the speech of judicial candidates, but rather is censorship of public commentary about Justice Goodson.

Unlike the judicial canon in *Williams-Yulee*, a preliminary injunction would not advance the state's interest in preserving public confidence in the integrity of the judiciary.

Third, even if the requested preliminary injunction advanced a compelling interest, it would not be narrowly tailored. Where a governmental burden on speech is subject to strict scrutiny, "the restriction must be the 'least restrictive means among available, effective alternatives[,]" meaning if there are *any* "less speech-restrictive means by which the Government could likely" further its compelling government interest, the restriction on speech fails strict scrutiny. *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (quoting *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)). There are two obvious, constitutionally-permissible alternatives to a preliminary injunction. The first, and most appropriate, alternative is more speech. *Id.*, at 726 (concluding that the Stolen Valor Act was unconstitutional because "the Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest"). The second alternative is that Justice Goodson may pursue a claim for damages for defamation so long as she can prove at trial the normal elements of defamation and, by clear and convincing proof, actual malice. *See Davis*, 510 U.S. at 1318 (Blackmun, J., in chambers) ("Subsequent civil or criminal proceedings, rather than prior restraints, ordinarily are the appropriate sanction for calculated defamation or other misdeeds in the First Amendment context.").

There is a third alternative to a preliminary injunction that is undoubtedly less restrictive on speech, though its constitutionality is debatable. Some states permit permanent injunctions barring speech issued only after a final adjudication on the merits that the statements at issue are defamatory. *See Balboa Island*, 40 Cal. 4th at 1155–56, 156 P.3d at 349 (holding that an injunction "issued only following a determination at trial that the enjoined statements are defamatory, does not constitute a prohibited prior restraint of expression."); *but see Kinney*, 443 S.W.3d at 93–94

(concluding that all injunctions prohibiting future speech are unconstitutional prior restraints). While permanent injunctions prohibiting speech may, like preliminary injunctions, violate the First Amendment, they are undoubtedly less restrictive of First Amendment rights.

Goodson's requested preliminary injunction does not advance a compelling state interest and it would not be narrowly tailored. The Court should deny Goodson's request for a preliminary injunction.

III. Goodson Is Not Entitled To A Preliminary Injunction

Even if the Court finds that a preliminary injunction would not violate the First Amendment, the Court should reject Goodson's request. In considering a request for a preliminary injunction, the Court must evaluate Goodson's "likelihood of success on the merits, the threat of irreparable harm to [Goodson], the balance of the equities between the parties, and whether an injunction is in the public interest." *Gresham v. Swanson*, 866 F.3d 853, 854 (8th Cir. 2017), *cert. denied*, 138 S. Ct. 682, 199 L. Ed. 2d 536 (2018) (citing *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). Goodson has the burden of establishing a reasonable probability that she would succeed on the merits at trial, as well as a likelihood that she will suffer irreparable harm in the absence of an injunction. *See Powell v. Ryan*, 855 F.3d 899, 904–05 (8th Cir. 2017) (noting that the party requesting injunctive relief bears the burden of establishing these factors). Goodson's failure to meet her burden on either of these factors is fatal to her request for a preliminary injunction. *See id.* ("Powell's failure to show a likelihood of irreparable harm or a reasonable probability of success on the merits was sufficient reason for the district court to deny injunctive relief, so it is unnecessary to address other factors.")

A. Likelihood Of Success On The Merits

Goodson cannot establish a reasonable likelihood that the speech at issue is defamatory. To succeed on her defamation claim under Arkansas law, Goodson "must establish (1) the defamatory nature of the statement of fact; (2) the statement's identification of or reference to the plaintiff; (3) publication of the statement by the defendant; (4) the defendant's fault in the publication; (5) the statement's falsity; and (6) the damages suffered by the plaintiff." *Greenberg v. Horizon Arkansas Publications, Inc.*, 2017 Ark. App. 328, 4–5, 522 S.W.3d 183, 187 (2017) (citing *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 132, 964 S.W.2d 187, 192 (1998)). As there is no dispute that Justice Goodson is a public figure (Dkt. No. 2, ¶ 18), Goodson also has the burden of proving by clear and convincing evidence that RSLC-JFI made the allegedly defamatory statements with "actual malice." *Southall v. Little Rock Newspapers, Inc.*, 332 Ark. 123, 133, 964 S.W.2d 187, 193 (1998). The First Amendment requires holding a "public figure" defamation plaintiff to a higher standard of proof than a "private figure" plaintiff because "public figures normally enjoy greater access to effective channels of communication and, thus, have more realistic opportunities to counteract false statements than do private individuals . . . ." *Little Rock Newspapers v. Fitzhugh*, 330 Ark. 561, 579, 954 S.W.2d 914, 924 (1997) (*citing Gertz v. Welch, Inc.*, 418 U.S. 323, 344 (1974)).

1. The Statements At Issue Are True

Goodson is not entitled to a preliminary injunction because the statements Goodson identifies as defamatory are true, or at least sufficiently accurate for the purposes of a defamation claim. Under Arkansas law, a defamation action fails when the allegedly defamatory statements are "substantially true." The Arkansas Supreme Court explicitly endorsed the "substantial truth" doctrine as a defense to defamation liability in *Pritchard v. The Times Southwest Broadcasting,*

Inc., 277 Ark. 458, 463, 642 S.W.2d 877, 880 (1982). The Court recognized that "[t]he truth of the matter is a defense to a charge of defamation, but the exact truth is not required:"

> [I]t is now generally agreed that it is not necessary to prove the literal truth of the accusation in every detail, and that it is sufficient to show that the imputation is substantially true, or as it is often put, to justify the "gist", the "sting" or the "substantial truth" of the defamation.

Pritchard, 277 Ark. at 463 (1982) (quoting William L. Prosser, Handbook of the Law of Torts 798-99 (4th ed. 1971)). Under *Pritchard* and other precedents, the "substantial truth" defense does not turn on the literal falsity of a single statement. Courts must look, instead, at the entirety of the allegedly defamatory statements to examine the "gist."

To determine whether the "substantial truth" defense has been established, Arkansas courts apply a test that compares whether the allegedly defamatory statement produces the same basic effect on the recipient as the precise truth would. *See Butler v. Hearst-Argyle Television, Inc.*, 345 Ark. 462, 468-69, 49 S.W.3d 116, 120 (2001) ("A statement is substantially accurate if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.") (citation omitted). In *Butler*, the defendant news station reported a story detailing a sexual relationship between a district attorney and an individual being prosecuted by his office. Although the plaintiff disputed many specific facts in the report, this Court upheld summary judgment on the substantial truth defense because the evidence showed that a sexual relationship had indeed taken place. *Id.* at 471 ("[W]e cannot say that the trial court erred by finding that appellees' report was a fair and substantially true account . . . ."). The truth of various individual facts did not alter the overall effect of the story on the public. *Id*.

In this case, the statements are issue are unequivocally true or at least substantially true. The statements regarding gifts Justice Goodson received from trial lawyers are factually true, and Goodson does not dispute them (Dkt. No. 2, ¶¶ 3; 23). Goodson argues that the advertisements

falsely *imply* that she does not recuse from cases involving campaign supporters and persons or entities who have given her gifts. Even if the advertisements make such an implication, which RSLC-JFI does not concede, the statements are not defamatory.

Despite Goodson's protestations, Justice Goodson does not recuse from every case involving persons or entities who gave her gifts. Goodson claims in her *verified* complaint that she "has always recused from participating in any cases involving persons or entities with whom she has a close personal relationship and/or who gave her gifts" including—specifically—Tyson Foods (*Id.*, ¶ 23). The statement in Goodson's *verified* complaint is false. Justice Goodson not only failed to recuse from a 2011 alleged toxic tort suit in which Tyson Foods was a defendant, she authored the opinion ruling in favor of Tyson. *See Green v. George's Farms, Inc.*, 2011 Ark. 70, 378 S.W.3d 715 (2011). Therefore, even if the RSLC-JFI's advertisement implies that Justice Goodson hears cases involving parties that have given her gifts, the implication would be true.

Furthermore, Justice Goodson's recusal from cases specifically involving trial attorneys who donated to her campaign and gave her gifts does not change the fact that she does not recuse from many cases in which those very attorneys have a vested interest. *See, e.g. Bayer CropScience LP v. Schafer*, 2011 Ark. 518, 13, 385 S.W.3d 822, 831 (2011) (Goodson, J.) (holding that a law capping punitive damages awards was unconstitutional). Indeed, Justice Goodson recently did not recuse from *Martin v. Humphrey*, where the Arkansas Supreme Court held that Issue 1, a ballot measure strongly opposed by Arkansas trial lawyers, was unconstitutional. 2018 Ark. 295, at *5.

Justice Goodson is not a trial judge, she is a Justice of the Arkansas Supreme Court. The role of the Arkansas Supreme Court is not limited to resolving cases and controversies between adverse parties. The Court's decisions develop and articulate legal precedent in future cases or controversies, including those involving Justice Goodson's campaign benefactors and friends who

have given her substantial gifts. The Arkansas Supreme Court also has the sole authority under Amendment 80 of the Arkansas Constitution to "prescribe the rules of pleading, practice and procedure for all courts." Ark. Const. Amend. 80, § 3. The Arkansas Supreme Court has interpreted its rule-making authority to strike down legislative attempts at tort reform—a critical issue for the very trial lawyers who donated to Justice Goodson's campaign and gave her gifts. *See Johnson v. Rockwell Automation, Inc.*, 2009 Ark. 241, 9, 308 S.W.3d 135, 141 (holding that portions of the Civil Justice Reform Act of 2003 violate Amendment 80).

The fact that Justice Goodson generally recuses from cases where campaign supporters do not directly appear does not mean that she cannot be criticized for hearing cases in which individuals and entities who gave her tens of thousands of dollars have a vested interest. Justice Goodson may find this criticism unfair, and she is free to make her case to the public. But running factually correct advertisements about her campaign donations and expensive trips does not amount to defamation.

The statements regarding the requested pay raise are also true, or at least substantially true. There is no dispute that the Arkansas Supreme Court voted in favor of an $18,000 pay raise for each of its members, and that Chief Justice Kemp requested the pay raise on behalf of the members of the Court—including Justice Goodson (Dk. No. 2, ¶ 25). Accordingly, the statements made by RSCL-JFI regarding the pay raise are not defamatory because the "gist" of the claim is true. *Butler*, 345 Ark. at 468-69, 49 S.W.3d at 120 ("A statement is substantially accurate if its 'gist' or 'sting' is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced.") (citation omitted). Furthermore, Goodson's refusal to disclose her vote on the pay raise only bolsters the veracity of RSCL-JFI's claim.

The statements cited by Goodson are true, or at least substantially true. Goodson cannot show a reasonable probability of success on the merits. The Court should deny her request for a preliminary injunction.

2. Goodson Cannot Establish A Reasonable Likelihood That She Will Prove Actual Malice By Clear And Convincing Evidence

To prove "actual malice," Goodson must establish that RSLC-JFI made a defamatory statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Southall,* 332 Ark. at 133, 964 S.W.2d at 192. Actual malice, in the defamation context, necessitates proving a subjective state of mind by clear and convincing evidence:

> A "reckless disregard" for the truth, however, requires more than a departure from reasonably prudent conduct. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." The standard is a subjective one--there must be sufficient evidence to permit the conclusion that the defendant actually had a "high degree of awareness of…probable falsity." As a result, failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard.

Harte-Hanks, 491 U.S. at 688 (citations omitted); s*ee also Campbell v. Citizens for an Honest Gov't, Inc.*, 255 F.3d 560, 575-76 (8th Cir. 2001) (applying the *Harte-Hanks* "actual malice" definition to find that defendant did not act with "actual malice," despite reliance on various sources, each of questionable credibility). According to the Eighth Circuit, "[t]he standard is, therefore, a 'daunting one,'" particularly because "[i]t is not material that the speaker has a personal motive." *Campbell*, 255 F.3d at 569 ("actual malice" standard is "daunting"; "a defendant's ill will, desire to injure, or political or profit motive does not suffice.") (citations omitted); *Lancaster v. Daily Banner-News Publ'g. Co.,* 274 Ark. 145, 148, 622 S.W.2d 671,672 (1981) (personal motive is immaterial to actual malice test).

In her verified complaint and request for preliminary injunction, Goodson appears to argue that RSLC-JFI's publication of the statements at issue are being made with actual malice because RSLC-JFI continued publishing the advertisements after the Rapid Response Team, a non-governmental citizens group, determined that the statements at issue were false or misleading (Dkt. No. 2, ¶¶ 13-15). Goodson cites no authority even suggesting that actual malice can be found under such circumstances. Furthermore, RSLC-JFI reviewed, considered, and responded to the Rapid Response Team's findings, despite being under no obligation to do so (Dkt. No. 1, 33-35). The RSLC-JFI rejected the findings and underlying rationale of a citizens group. That is not actual malice. The Court should deny Goodson's request for a preliminary injunction.

B. Goodson Cannot Demonstrate That Justice Goodson Or Her Campaign Will Suffer Irreparable Harm Absent An Injunction

Goodson offers no evidence of irreparable harm in her verified complaint and request for a preliminary injunction. Goodson appears to argue that the alleged irreparable harm would be that, absent a preliminary injunction, Justice Goodson will lose in the upcoming election (Dkt. No. 2, ¶ 33). In support of her argument, she cites several past elections where candidates opposed by what she terms "dark money" lost in judicial elections (*Id.*, ¶¶ 34-36).

As a preliminary matter, RSLC-JFI objects to Goodson's suggestion that the Republican State Leadership Committee ("RSLC") is a "dark money" group. Contrary to the completely false statement in Goodson's *verified* complaint (Dkt. No. 2, ¶ 11), RSLC discloses its donors, and quarterly reports providing information on the RSLC's donors for the 2018 election cycle is publicly available on the website for the Internal Revenue Service. In fact, the RSLC filed a Form 8872 Report of Contributions and Expenditures on October 19, 2018, less than a week before Goodson filed suit. *See* Amended Quarterly Report of Contributions and Expenditures,

https://forms.irs.gov/app/pod/basicSearch/search?_eventId_displayForm=true&formId=106976&formtype=e8872&execution=e1s3 (last visited October 28, 2018).

The harm identified by Goodson is not irreparable. If Goodson loses in the upcoming election and believes that RSLC-JFI's advertisements were the difference in the outcome, she can sue RSLC-JFI for money damages. Damages are the traditional, and perhaps exclusive, remedy for defamation in Arkansas. *See Esskay Art Galleries v. Gibbs*, 205 Ark. 1157, 172 S.W.2d 924, 927 (1943) ("[W]here no breach of trust or of contract appears, equity will not enjoin libelous or slanderous statements injurious to plaintiff's business, trade, or profession, or which operate as a slander of his title to property, but the complainant will be left to his remedy at law."); *Heuer v. Basin Park Hotel & Resort*, 114 F. Supp. 604, 609 (W.D. Ark. 1953) (striking plaintiff's claim for injunctive relief for alleged defamation as barred by Arkansas law).

Furthermore, the list of elections cited by Goodson is notably incomplete. While Goodson cites several instances where candidates opposed by outside groups lost elections, she omits two campaigns held in 2018. Bart Virden, a member of the Arkansas Court of Appeals, won re-election in May of 2018 despite being opposed by RSLC-JFI. Furthermore, Justice Goodson is in the upcoming runoff election because she received the most votes of three candidates for the Arkansas Supreme Court despite being criticized by the Judicial Crisis Network. Goodson cannot demonstrate irreparable harm.

C. Balance Of The Equities And Public Interest

Goodson's failure to demonstrate a likelihood of success on the merits or irreparable harm are fatal to her request for a preliminary injunction. The remaining *Dataphase* factors also weigh in favor of denying her request.

The public has an interest in receiving information about candidates for public office. The First Amendment protects the right to receive information in addition to the right to share it. *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 806, 98 S. Ct. 1407, 1431, 55 L. Ed. 2d 707 (1978) (White, J. dissenting) ("The self-expression of the communicator is not the only value encompassed by the First Amendment. One of its functions, often referred to as the right to hear or receive information, is to protect the interchange of ideas."). It is not in the interest of the public to silence criticism of Justice Goodson, who has the right and platform to respond to speech that she dislikes with her own speech. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.").

Similarly, Justice Goodson's interest in being re-elected does not outweigh RSLC-JFI's First Amendment right to share information, or the people of Arkansas's First Amendment right to receive it. Therefore, the balance of equities and public interest weigh in favor of denying Goodson's request for a preliminary injunction. *See Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008), *overruled on other grounds by Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678-690 (8th Cir. 2012) (recognizing that the balance of equities and public interest factors generally favor the constitutionally protected freedom of expression).

IV. Conclusion

The statements made in RSLC-JFI's advertisements are true. To the extent Justice Goodson and her campaign disagree, she can share her message with the public. However, the First Amendment prohibits Justice Goodson from obtaining a preliminary injunction silencing her critics. This Court should reject Goodson's request for a preliminary injunction.

QUATTLEBAUM, GROOMS & TULL PLLC
111 Center Street, Suite 1900
Little Rock, Arkansas 72201
Telephone: (501) 379-1700
Facsimile: (501) 379-1701

By:/s/John E. Tull III
John E. Tull, III (84150)
Vincent Chadick (94075)
Christoph Keller (2015145)

Attorneys for Republican State Leadership Committee, Judicial Fairness Initiative

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which shall send notification of such filing to all counsel of record.

/s/John E. Tull III
John E. Tull