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Arizona Supreme Court: Commentary by Radio Talk Show Host about U.S. Congressional Candidate Protected from Defamation Claim

By [Michael Lambert](#)

A two-year defamation case reached a fitting end in April as the Arizona Supreme Court held that political statements made about a political candidate's conduct at a political rally were protected as opinion and political speech. In a 13-page opinion, a unanimous Arizona Supreme Court dismissed the suit with prejudice and held that the nine statements at issue were not actionable in light of "each statement's content, the overall context, and the protections afforded to core political speech by the First Amendment." *Harris v. Warner*, No. CV-21-0242-PR, 2023 WL 2941654, at *1 (Ariz. Apr. 14, 2023). The nine statements can be found below within their context.

Harris opines on McCarthy's conduct at political rally and fitness for office on *The Conservative Circus*

The case began after the 2020 presidential election when former Arizona Republican Congressional candidate Daniel McCarthy sued iHeartMedia, Inc. and James T. Harris, the "ringleader" and host of *The Conservative Circus*, for \$120 million over comments Harris made on his radio talk show about McCarthy's fitness for office and actions at a "Stop the Steal" rally at the Arizona State Capitol. While Harris spoke to a crowd at the rally, McCarthy and his supporters interrupted him and insisted that Harris be removed from the stage. On two episodes of *The Conservative Circus*, Harris discussed the encounter at the rally and the fate of the Republican party. Harris questioned why McCarthy, a Republican like him, was making "a public spectacle of himself" and "going off on" him at the rally. Harris believed McCarthy and his supporters acted "unhinged," "hostile," "absurd," and "crazy." According to Harris, McCarthy, who tried to create a new political party, was a "sad example of a conservative" and "no example of what a leader should be."

The Arizona Superior Court dismisses 20 out of 29 statements as not actionable

In a one-count defamation complaint filed less than three months after the episodes aired, McCarthy alleged that Harris made 29 defamatory statements on *The Conservative Circus*. In a Motion to Dismiss for Failure to State a Claim, iHeart, represented by a team of Haynes Boone lawyers, argued that the First Amendment protected the comments made by Harris, who is "unabashedly conservative," about a local politician's public conduct at a political rally. Arizona Superior Court Judge Randall H. Warner granted the Motion to Dismiss as to 20 of the statements, but he found that nine of the statements "could be actionable."

Soon after, iHeart filed a Petition for Special Action with the Arizona Court of Appeals, which declined discretionary review. iHeart then appealed the case to the Arizona Supreme Court, which granted iHeart's Petition for Review to decide "an issue of statewide importance" under "enhanced appellate review."

The Arizona Supreme Court finds the remaining nine statements protected as opinion, political speech

Justice William G. Montgomery, writing for the Arizona Supreme Court, explained in detail why none of the nine statements were actionable. The Court wrote that seven of the nine statements, "either cannot be reasonably interpreted as a factual assertion, [are] not provable as false, or both." *Harris*, 2023 WL 2941654, at *5. "Given the overtly political context, tone, and general purpose of *The Conservative Circus*," Statements (1)-(6) and (9)

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“are all readily recognized as rhetorical political invective or mere hyperbole and not statements or implications of objective fact.” *Id.* at *4. Because “Harris’ commentary is overwhelmingly characterized by his personal and subjective impressions, lacking any objective criteria by which to measure its falsity,” “it is impossible to prove whether they are true or false, which is necessary for a defamation action.” *Id.*

According to the Court, Statement (2)—“What I saw on Saturday was downright frightening because they were unhinged”—“cannot be measured by any objective criteria for determining whether McCarthy’s conduct was in fact ‘downright frightening’ to Harris and ‘unhinged’ because it reflects Harris’ subjective impressions.” *Id.* at *5.

When reviewing Statement (9)—that McCarthy “didn’t even have enough faith in his own voice to invest in it”—the Court found that “determining whether McCarthy did or did not have enough faith in his own voice to invest in his campaign ‘is not the kind of empirical question a fact-finder can resolve.’” *Id.* (quoting *Yetman v. English*, 168 Ariz. 71, 81 (1991)).

Statement (5)—that McCarthy was “attacking other people”—“cannot be reasonably interpreted as referring to physical action when read in context. Rather, it is fairly understood as Harris’ subjective characterization of McCarthy’s speech that cannot be measured by any objective criteria.” *Id.* Statements (1), (3), (4), and (6) were dismissed for the same reasons.

The Court determined that Statement (7)—that McCarthy and his supporters “created something called the Guerilla Party”—was not actionable because “the mere assertion that McCarthy created a new political party is not defamatory.” *Id.* “Nothing about forming a new party, a constitutional right, would bring McCarthy ‘into disrepute, contempt, or ridicule,’ or impeach his ‘honesty, integrity, virtue, or reputation.’” *Id.* (quoting *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341 (1989)).

As for Statement (8)—that “[McCarthy] told people he would put a million dollars” into his campaign but that he was “nowhere close”—the Court reasoned that even though the statement may be factual, “[u]nder the First Amendment, apparently factual statements must be considered in light of the nature in which the speaker uttered them and the relationship of the statements to the overall context.” *Id.* The Court emphasized the importance of speech about the qualifications of candidates for public office—“free and open debate on public issues and governmental action should not be chilled by rules requiring courts artificially to single out statements of fact and treat them in a vacuum.” *Id.* at *6 (quoting *AMCOR Inv. Corp. v. Cox Ariz. Publications, Inc.*, 158 Ariz. 566, 571 (Ct. App. 1988)).

The Court’s decision to dismiss Statement (8) was “colored by the context of an overtly political talk show.” *Id.* at *5. “When listeners tune into *The Conservative Circus*, they thus expect to hear political commentary offered by Harris that reflects his opinion ‘in an entertaining manner.’” *Id.* The Court relied on a pair of cases that found that when statements are made on an overtly political talk show, the public is more likely to expect subjective opinion, not statements of objective fact. See *Herring Networks, Inc. v. Maddow*, 8 F.4th 1148, 1157 (9th Cir. 2021); *McDougal v. Fox News Network, LLC*, 489 F. Supp. 3d 174, 184 (S.D.N.Y. 2020). But the Court carefully avoided making any sweeping declarations about statements made on talk shows: “[W]e do not suggest that the First Amendment provides categorical protection to anything that may be said on a political talk show.” 2023 WL 2941654, at *5.

In the end, the Court the Court reversed the Superior Court’s decision and ordered that it dismiss McCarthy’s complaint with prejudice.

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Nine statements at issue

Statement (1): “Someone needs to tell Daniel McCarthy that he – if he’s running for office, he has disqualified himself, because no one in the world would ever decide to support a guy who has **absolutely no control over his emotions or the emotions of the people who are supposed to be supporting him.**”

Statement (2): “Someone needs to tell Daniel McCarthy that he – if he’s running for office, he has disqualified himself because no one in the world would ever decide to support a guy who has absolutely no control over his emotions or the emotions of the people who are supposed to be supporting him. What I saw on Saturday **was downright frightening because they were unhinged.**”

Statement (3): “Dr. Ward’s daughter was in the audience, and they – they went – they said some of the most crazy, out world, just – and I went over, I’m like, are you okay? She was visibly shaken, angry. These lunatics – look. When we have these kind of events, we need to make sure that we are not down there **acting like ANTIFA.** We need to make sure we’re not acting like BLM. We need to be better than them or we will cannibalize our own movement.”

Statement (4): “What I saw out there on Saturday from Daniel McCarthy and his – his thugs was disturbing. And based on what I saw down at the Capitol, people are going to remember this. They’re going to remember him as the guy who **surrounded himself with thuggish bodyguard types.**”

Statement (5): “Why would a guy who claims to have so much money and time attack fellow conservatives if in fact he’s a conservative? Other than his rhetoric, there’s no evidence of that whatsoever. Why would he make a public spectacle of himself and **go on the attack, attacking** the very few people who are on the same side of the political aisle?”

Statement (6): “And I said to them, one of the guys, I’m like, dude, is this real? Are you serious? Are you seriously trying to take this microphone away – away from me? Then it **got hostile** as they were trying to get the microphone from the woman who had organized the event, and other people were just not having it.”

Statement (7): “Let’s talk about the impact of this behavior. You said subversive and divisive. In the last 24 hours, less than, I heard that they **created something called the Guerilla Party.** The Guerilla Party. I can’t see how that would help the Conservative cause.”

Statement (8): “**He had an opportunity to dump more money into his campaign. He told people he would put a million dollars,** and I’m hearing **he was** nowhere – nowhere – **nowhere close.**”

Statement (9): “He had an opportunity to dump more money into his campaign. He told people he would put a million dollars, and I’m hearing he was nowhere – nowhere – nowhere close. **Daniel McCarthy didn’t even have enough faith in his own voice to invest in it.**”