

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2018-0198

AUTOMATED TRANSACTIONS, LLC AND DAVID BARCELOU,

*Appellant,*

v.

AMERICAN BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, INC., ROBERT H. STIER, JR., PIERCE ATWOOD LLP, CHARLES VON SIMSON, W. JOHN FUNK, GALLAGHER, CALLAHAN & GARTRELL, P.C., RALPH E. JOCKE, WALKER & JOCKE CO., LPA, MASCOMA SAVINGS BANK, AND STEPHEN F. CHRISTY,

*Appellee,*

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APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE SULLIVAN COUNTY SUPERIOR COURT

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**BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES  
UNION OF NEW HAMPSHIRE AND ELECTRONIC FRONTIER  
FOUNDATION IN SUPPORT OF APPELLEES**

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September 17, 2018

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## QUESTIONS PRESENTED

1. Whether the term “patent troll” – which on its face alludes to a mythological Norse entity – is unactionable rhetorical hyperbole.
2. Whether the First Amendment allows a plaintiff to use the courts to unilaterally impose his definition of a fanciful term when critics use the term in public debate in a manner he does not like.
3. Whether the First Amendment allows defendants to use strong language to express negative opinions about plaintiffs’ litigation campaign, or whether such language should instead give rise to ancillary defamation litigation in New Hampshire courts.

## IDENTITY OF AMICI CURIAE

*Amicus curiae* American Civil Liberties Union of New Hampshire (“ACLU-NH”) is the New Hampshire affiliate of the American Civil Liberties Union (“ACLU”)—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under state and federal law, including the right to freedom of speech. The ACLU-NH has appeared before state and federal courts in numerous First Amendment cases, both as direct counsel and as *amicus curiae*. These cases include: *Montenegro v. N.H. DMV*, 166 N.H. 215 (2014) (regulation allowing a vanity license plate to be rejected if it is offensive to good taste violated the right to free speech because it authorized arbitrary and discriminatory enforcement) (as amicus); *City of Keene v. Cleaveland*, 167 N.H. 731, 741 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that “the First Amendment shields the respondents from tort liability for the challenged conduct”) (as amicus); *Doyle v. Comm’r, N.H. Dep’t. of Resources & Economic Dev.*, 163 N.H. 215 (2012) (special use permit was overbroad because it applied without regard to the number of people attending an event and to a wide range of speech that had no relation to defendants’ significant interests) (as direct counsel); *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017) (striking down New Hampshire law banning online “ballot selfies” on grounds that it violates the First Amendment) (as direct counsel); *Petrello v. Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793 (D.N.H. Sep. 7, 2017) (striking down, on First Amendment grounds, Manchester’s anti-panhandling ordinance, as well as permanently enjoining Manchester’s anti-panhandling police practices) (as direct counsel).



*Amicus curiae* Electronic Frontier Foundation (EFF) is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 38,000 dues-paying members have a strong interest in both sound patent policy and freedom of expression. EFF frequently participates in the public debate concerning patent policy and litigation through media interviews, blog posts, public speaking, and submissions to regulatory agencies and to Congress. As part of its mission, EFF has often served as *amicus curiae* in patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); and *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). EFF has also served as *amicus curiae* in numerous First Amendment cases including *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Free Speech Coalition Inc. v. Attorney General United States*, 825 F.3d 149 (3d Cir. 2016); and *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014).

## INTRODUCTION

Plaintiffs are attempting to use New Hampshire courts as a vehicle to chill protected speech and silence criticism. The challenged statements in this case are part of a national debate about patent policy and litigation. In particular, they are at the center of a debate about entities, like Plaintiffs, whose primary business model is the assertion of patent rights. Some believe that such companies—known variously as “non-practicing entities,” “patent assertion entities,” or “patent trolls”—are a drain on the economy and use the high cost of litigation to extract unwarranted licensing fees. Others believe that patent assertion entities are an essential vehicle to vindicate intellectual property rights. Regardless of one’s views, neither side of this debate should be able to use the courts to silence the other.

The First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As part of this commitment, courts have long recognized that strong language and rhetorical hyperbole does not, standing alone, give rise to a defamation claim. *Riley v. Harr*, 292 F.3d 282, 297 (1st Cir. 2002).

In this case, Plaintiffs strenuously object to the use of the term “patent troll”; but this term is classic rhetorical hyperbole. The term has no settled definition and, indeed, is plainly fanciful in its allusion to creatures from Norse myths. Yet Plaintiffs want to use the courts to impose their own idiosyncratic definition of “patent troll,” thereby policing the language of their critics.

If Plaintiffs succeed in this case, New Hampshire courts will become a forum of choice for other patent assertion entities seeking to set the terms of the patent debate and to suppress criticism. Fortunately, neither the First Amendment nor defamation law will abide such a result.

## STATEMENT OF THE CASE

In their First Amended Complaint (FAC), Plaintiffs David Barcelou and Automated Transactions LLC (ATL), attack a huge range of expression. The FAC names banking and credit union associations, lawyers, law firms, and news publishers as defendants. It alleges that these various entities defamed Plaintiffs in news articles (FAC ¶¶ 68, 73, 79), an interview (FAC ¶ 72), legal commentary (FAC ¶¶ 78, 83-85), and industry group commentary (FAC ¶¶ 69-71). Plaintiffs even alleged that the publication of a picture of a small toy troll holding a mushroom defamed Mr. Barcelou. *See* FAC ¶¶ 73-74. While not all of these statements are at issue on appeal, the remaining statements include speech at the core of the public debate around patent policy, including legal commentary, industry group commentary, and formal submissions to the Senate Committee on the Judiciary and the Energy and Commerce Committee of the House of Representatives. *See* FAC ¶ 75, 81-82; *Br. of Appellants* at 25-26.

Mr. Barcelou is the named inventor on various patents relating to automated teller machine (ATM) technology. *See* FAC ¶¶ 55; 58. These patents relate generally to providing “services that were not previously available to a consumer over the Internet via an ATM.” FAC ¶ 52. Around 2001, Mr. Barcelou made “efforts to commercialize his ideas” but these efforts were “unsuccessful.” FAC ¶ 54.

Mr. Barcelou was issued his first ATM patent in 2005, U.S. Patent 6,945,457 (the ’457 patent). *Id.* Claim 1 of the ’457 patent reads, in full, as follows:

1. Integrated banking and transaction apparatus for use by a consumer, comprising:
  - an automated teller machine; and
  - means for providing a retail transaction to the consumer through an Internet interface to the automated teller machine.

'457 patent, column 5, lines 53-58. Around 2005, after having seen his own “business efforts fail,” Mr. Barcelou came to believe that other companies were practicing his patented invention. FAC ¶ 55. In 2008, one of Mr. Barcelou’s companies “signed an exclusive licensing agreement with ATL” and “ATL began offering patent licenses, suing when necessary and defending the patents in the Patent Office when necessary.” FAC ¶ 56. In sum, under Plaintiffs’ own account, exclusive rights in the relevant patents were transferred to ATL *after* Mr. Barcelou’s commercialization efforts failed. *See* FAC ¶¶ 52-58. Moreover, these transfers were made so that ATL could pursue a business strategy of patent licensing and enforcement. *See id.*

By the end of 2012, about 200 entities had agreed to take a license to ATL’s patents, generating average licensing revenue of approximately \$15,000 per entity. *See* FAC ¶ 60 (alleging that “about 200 entities” took a license generating “[a]bout \$3 Million in licensing revenues”). These per-entity licensing revenues are far below the cost of defending a patent suit in district court or challenging a patent at the United States Patent and Trademark Office. *See Am. Intellectual Prop Law Ass’n Report of the Economic Survey* 41 (2017) (median cost of litigating through to the end of discovery is \$250,000 in patent suits with less than \$1 million at stake); *id.* at 43 (reporting average expenses of \$100,000 through the filing of an *inter partes* review petition, \$275,000 through the end of the Patent Trial and Appeal Board’s hearing, and \$350,000 through appeal).

On April 23, 2012, a unanimous panel of the Federal Circuit issued a decision addressing two appeals in related cases involving ATL. *See In re Transaction Holdings Ltd., LLC*, 484 F. App’x 469, 2012 WL 1392647 (Fed. Cir. 2012). The first case arose out of a patent infringement action filed by ATL against 7-Eleven, Inc. and other companies alleging infringement of claims from five patents, including the ’457 patent. *See* 484 F. App’x at 470. The district court had

issued a summary judgment ruling of non-infringement as to all asserted patent claims. *Id.* In the second case considered by the Federal Circuit, a related entity called Transaction Holdings Ltd. appealed a ruling by the Board of Patent Appeals and Interferences (BPAI) affirming a patent examiner's rejection, after an *ex parte* review proceeding, of seven claims from the '457 patent. *See id.*

The Federal Circuit affirmed the BPAI's ruling. *See id.* at 471-473. The Federal Circuit found that another reference had "taught the use of an ATM over 'the information superhighway' to perform retail transactions" before Mr. Barcelou filed his patent application. *Id.* at 471. The Federal Circuit agreed that claims 1-3, 5, 9, 10 and 14 of the '457 patent "would have been obvious in light of the prior art." *Id.* at 473.

Turning to the appeal of the district court's non-infringement ruling, the Federal Circuit again affirmed on all claims. *See id.* at 473-476. The five "patents at issue" were "generally directed to a method and apparatus for providing banking services and retail transactions to a consumer through an ATM that is connected to the Internet." *Id.* at 471. These patents all shared a specification (the part of the patent describing the invention) and "very similar claims." *Id.* The Federal Circuit found claims 1 and 9 of the '457 patent to be "representative of the asserted claims." *Id.*

A key issue on appeal involved construction of claim terms referring to the "Internet." *See id.* at 473-74.<sup>1</sup> The Federal Circuit interpreted the terms "Internet access" and "Internet connection" to "require that the ATMs have access to retail services publicly available over the Internet and exclude ATMs that are connected only to private networks." *Id.* at 474. Reviewing

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<sup>1</sup> A patent's claims define its scope. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 373 (1996). Courts engage in "claim construction" when they interpret key terms from a patent's claims. *See id.* at 379-88.

the record, the appeals court concluded that it was “undisputed” that the accused ATMs were themselves “not connected to the Internet and cannot be accessed over the Internet.” *Id.*

Having failed to convince the court that the ATMs literally infringed the claims, ATL attempted to argue that the accused devices still infringed under patent law’s “doctrine of equivalents.” *See id.* at 475. The Federal Circuit rejected this argument:

[T]he claims expressly require a connection to the Internet. Omitting that limitation while asserting the doctrine of equivalents would violate the ‘all limitations rule.’ Moreover, this is not a case in which the accused products practice a close equivalent of the disputed limitation. A connection to a private network is substantially different from a connection to the Internet.

*Id.* Accordingly, in addition to invalidating five claims from the ’457 patent, the appeals court affirmed the district court’s ruling of non-infringement as to all asserted claims from all five patents. *Id.*

ATL filed a petition for panel rehearing and rehearing *en banc* asking the Federal Circuit to revisit its ruling. That petition was denied without further opinion on July 2, 2012. *See* 484 F. App’x 469. ATL then filed a petition for certiorari before the Supreme Court. *See* Petition for Writ of Certiorari, No. 12-674, 2012 WL 5982624, *Automated Transactions, Ltd. v. Kappos* (Nov. 29, 2012 S. Ct). ATL’s petition argued that the lower courts had improperly limited ATL’s patents “based on a definition of the term ‘Internet’ for purposes of patent protection as consisting solely of a ‘public network’ and not including private networks.” 2012 WL 5982624 at \*i. The Supreme Court denied certiorari without opinion on Jan 14, 2013. *See Transaction Holdings, Ltd. v. Kappos*, 568 U.S. 1125 (2013) (Mem.).

ATL’s licensing revenue declined after 2012. FAC ¶¶ 90-92. This drop in licensing revenue coincided with the Federal Circuit’s adverse non-infringement ruling—and its underlying construction of “Internet” to exclude local networks—becoming final and binding

upon ATL. *Compare* FAC ¶ 90 (graph showing precipitous drop in ATL’s licensing revenue began in January 2013) *and Transaction Holdings, Ltd*, 568 U.S. 1125 (2013) (denying petition for certiorari on January 14, 2013).

Plaintiffs acknowledge that terms like “patent troll” would be excluded from any patent litigation. *See Br. of Appellants* at 22. Nevertheless, Plaintiffs’ contention is that Defendants’ criticism and harsh language, and not the federal courts’ rejection of ATL’s theory of infringement, is to blame for ATL’s declining financial fortunes. *See* FAC ¶¶ 88-93.<sup>2</sup> Ultimately, this Court does not need to settle the question of whether the decline in ATLs licensing business was caused by Defendants’ criticism or by the federal courts’ rejection of Plaintiffs’ infringement case. Rather, the issue for the Court is whether Defendants’ statements are actionable at all.

Although Plaintiffs’ primary complaint is with Defendants’ use of the term “patent troll,” the term as it is generally understood is apt. *See* FAC ¶¶ 68-78, 83-85. Plaintiffs’ own FAC makes it clear that ATL is in the business of patent assertion and that it acquired its exclusive interest in the relevant patents *after* Barcelou’s failed efforts to commercialize. *See* FAC ¶¶ 52-58. Nevertheless, Plaintiffs allege that statements referring to ATL and/or Barcelou as a “patent troll” are factually false and defamatory. *See, e.g.*, FAC ¶¶ 72, 74. To bring this claim, Plaintiffs insist that the courts must define “patent troll” to exclude entities where the named inventor retains some interest or control. *See* FAC ¶ 87; *Br. of Appellants* at 1, 13, 22.

Plaintiffs also allege that the use of harsh language—specifically “shakedown,” “extortion,” and “blackmail”—to describe their litigation campaign was defamatory. FAC ¶¶ 68,

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<sup>2</sup> Notably, all except for one of the allegedly defamatory statements occurred after ATL’s licensing revenue collapsed that the start of 2013. *See* FAC ¶ 90 (presenting a graph with ATL’s licensing revenue together with arrows marking the timing of challenged statements).

77, 79. Plaintiffs contend that the use of this harsh language to describe their litigation campaign renders the statements *factually* false because “neither ATL nor Mr. Barcelou are trolls, shakedown artists, extortionists or blackmailers.” FAC ¶ 87.

## ARGUMENT

### I. **The First Amendment Guarantees a Wide-Latitude for Participants in Public Debate Over Issues Such as Patent Law and Policy.**

The Constitution’s guarantee of free speech imposes a fundamental limit on the scope of defamation law and on “the *type* of speech which may be the subject of state defamation actions.” *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16 (1990) (emphasis in original). Most relevant to this case, is the Constitutional protection for the expression of opinion. *See id.* at 20. While statements couched as opinions may be actionable if they imply or disclose facts capable of being proved true or false, pure opinion is immune from defamation liability. *See id.*; *Partington v. Bugliosi*, 56 F.3d 1147, 1156-57 (9th Cir. 1995); *Douglas v. Pratt*, No. 98-416, 2000 WL 1513712, at \*3 (D.N.H. Sept. 29, 2000). If someone expresses a misguided or offensive opinion, “we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974). This guarantee of open and robust expression about matters of public concern is fundamental to the American political system. *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (“speech concerning public affairs is more than self-expression; it is the essence of self-government”).

The First Amendment also provides leeway for speakers to use strong, figurative, or even offensive language when expressing their views. *See Greenbelt Co-op. Pub. Ass’n v. Bresler*, 398 U.S. 6 (1970). Speech cannot be found actionable merely because it is a “vigorous epithet” that some might find offensive or pejorative. *See id.* at 14; *see also Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 54 (1988) (noting that political cartoons are constitutionally protected



expression despite their “caustic nature”). Reliance on an “unflattering adjective to underpin a defamation claim offends the First Amendment.” *Levinsky’s, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 130 (1st Cir. 1997). While some may wish for public debate to be more civil, it is not the job of the courts to police language and tone. Whether Plaintiffs like it or not, “[h]yperbole is very much the coin of the modern realm.” *Id.* at 128.

Consistent with these principles, defamation law itself has long recognized a key distinction between pure opinion and forms of expression on the one hand, and factual statements on the other. *See Douglas*, 2000 WL 1513712, at \*3-4. Something phrased as opinion are actionable if it can reasonably be understood to imply the existence of facts capable of being proven true or false. *See Riblet Tramway Co. v. Ericksen Assocs., Inc.*, 665 F.Supp. 81, 84 (D.N.H. 1987); *Levinsky’s, Inc.*, 127 F.3d at 127. Speech is not actionable as defamatory merely because it deploys language that is harsh or unflattering. *See Catalfo v. Jensen*, 657 F. Supp. 463, 468 (D.N.H. 1987). Whether these questions are analyzed through the lens of the First Amendment, or common law defamation doctrine, the result is the same: pure opinion and rhetorical hyperbole are not actionable. *See Douglas*, 2000 WL 1513712, at \*3.

The public has a powerful First Amendment interest in learning about ATL’s litigation and patent litigation generally. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (The First Amendment “encompasses a range of conduct related to the gathering and dissemination of information.”); *Apple, Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) (public has interest in understanding court proceedings). This is particularly true when, as here, a litigant makes demands of a large number of companies. *See* FAC ¶¶ 56-57. Potential targets need to learn about potential threats and need to be able to communicate to organize any collective defense. Both state and federal policy makers also need to learn about litigation as they evaluate

whether or not to make changes in the law. *See* Innovation Act, H.R. 3309, 113th Cong. (2013) (bill proposing patent litigation reforms); N.H. Rev. Stat. § 359-M:2 (New Hampshire statute enacted in 2014 prohibiting “bad faith assertions of patent infringement”). Plaintiffs’ lawsuit is not just an attack on the defendants in this case, but on everyone who wishes to discuss patent law and policy.

## **II. Defendants’ Statements Are Part of an Important Public Debate About Patent Policy with Strongly Held Views on Both Sides.**

To understand Defendants’ speech in its full context, we should consider the wide-ranging debate about patent policy that has taken place over the last few years. This debate has focused on litigation by companies variously referred to as “non-practicing entities” (NPEs), “patent assertion entities” (PAEs), or “patent trolls.” *See generally* Brian T. Yeh, *An Overview of the “Patent Trolls” Debate*, Congressional Research Service Report for Congress (Apr. 16, 2013), *URL supra at p. iv*. While the term patent troll has no precise definition, it generally refers to entities that are in the business of asserting patents rather than directly commercializing the patented invention. *See id.* at Summary, 4; *see also* Part III.A. *infra* (discussing the definition of “patent troll,” or lack thereof, in detail).

Critics of patent trolls or PAEs<sup>3</sup> argue that the business model of patent assertion is a burden on productive companies and does little to promote innovation. *See* James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, Harv. Bus. Rev. (Nov. 2014), *URL supra at p. v*. Critics of patent trolls argue that PAEs opportunistically focus on end-users of technology rather than on deep-pocketed manufacturers that could more easily afford to mount a defense. *See* Colleen Chien & Edward Reines, *Why Technology Customers Are Being Sued En Masse for*

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<sup>3</sup> Consistent with how these terms are generally used, this brief uses “PAE” and “patent troll” loosely and interchangeably to discuss companies in the business of patent assertion.

*Patent Infringement and What Can Be Done*, 49 Wake Forest L. Rev. 235 (2014). The high cost of patent litigation places pressure on smaller companies to settle even weak claims of infringement. *See id.* at 237. Critics also argue that PAEs tend to assert low-quality patents and make questionable infringement arguments, which is reflected in a low rate of success on the merits. *See* John R. Allison, Mark A. Lemley & Joshua Walker, *Patent Quality and Settlement Among Repeat Patent Litigants*, 99 Geo. L.J. 677, 681 (2011) (finding that PAEs that asserted the same patent in more than eight cases lost more than 90% of the time when their cases were decided on the merits). The patent troll debate led to a number of legislative proposals before Congress. *See* Pauline Pelletier & Eric Steffe, *The Politics of Patent Law: Why Patent Reform Failed in 2015 and Prospects for 2016*, 8 *Landslide* 4 (2016).

On the other side of this debate, supporters of patent owners argued in defense of “patent trolls” and against legislative proposals aimed at solving a purported patent troll problem. *See* Erin Mershon, *Patent warfare: Trolls vs. Inventors*, Politico (Dec. 12, 2013), *URL supra at p. iv*. Defenders of PAEs have argued that “[p]atent trolls provide liquidity, market clearing, and increased efficiency to patent markets.” James F. McDonough III, *The Myth of the Patent Troll: An Alternative View of the Function of Patent Dealers in an Idea Economy*, 56 Emory L. J. 189, 190 (2006). One prominent attorney wrote that “all the noise coming from Silicon Valley about patent trolls is just . . . propaganda implementing a plan to run individual inventors out of business.” Raymond P. Niro, *Maybe Patent Trolls Aren’t So Evil After All*, 50 *Les Nouvelles* 36, 36 (2015). Similar arguments have been made countless times on pro-patent-owner blogs and forums. *See, e.g.*, Gene Quinn, *Silicon Valley’s Anti-Patent Propaganda: Success at What Cost?*, IP Watchdog (Oct. 14, 2014), *URL supra at p. iv*. These advocates have argued that the term “patent troll” unfairly maligns patent owners in an attempt to hype a “non-existent problem.” *Id.*

This debate about patent assertion and “patent trolls” has properly unfolded in the court of public opinion, not in New Hampshire Superior Court. *See Gertz*, 418 U.S. at 339-40. Ultimately, patent owner advocates succeeded in defeating federal legislative proposals aimed at patent trolling. *See Pelletier & Steffe, supra* at 6 (noting that legislative proposals for patent reform “los[t] momentum in 2015”).

As one might expect, strong rhetoric is hardly unique to one side of the patent debate. In recent years, defenders of strong patent rights have criticized the Patent Trial and Appeal Board (PTAB)<sup>4</sup> for, in their view, finding too many patents invalid. *See Megan M. La Belle, Public Enforcement of Patent Law*, 96 B.U. L. Rev. 1865, 1892-95 (2016). These critics have taken to calling PTAB panels “death squads.” *See, e.g., Rob Sterne & Gene Quinn, PTAB Death Squads: Are All Commercially Viable Patents Invalid?*, IP Watchdog (March 14, 2014), *URL supra* at *p. v.* Indeed, rhetoric comparing the administrative law judges of the PTAB to murderous, extra-judicial paramilitaries has become commonplace.<sup>5</sup>

It is no surprise that patent policy is a fiercely contested topic of public debate. Patents touch on innovation, prices, competition, and almost all of our devices. *See Federal Trade Commission, The Evolving IP Marketplace: Aligning Patent Notice and Remedies With Competition 1-5* (2011), *URL supra* at *p. iv.* The recent patent troll debate is merely the latest chapter. The Nineteenth Century saw a similar debate about whether “patent sharks” were engaged in unscrupulous patent assertion. *See Gerard N. Magliocca, Blackberries and Barnyards: Patent Trolls and the Perils of Innovation*, 82 Notre Dame L. Rev. 1809, 1838

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<sup>4</sup> The PTAB is an administrative tribunal, staffed by administrative law judges, within the United States Patent and Trademark Office. *See Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 584 U.S. \_\_\_, 138 S. Ct. 1365 (2018).

<sup>5</sup> As of September 12, 2018, a Google search for (PTAB and “death squad”) returns over 20,000 results.

(2007). The future will undoubtedly see further patent debates of varying intensity. In this, it is like any other major policy issue being contested within the marketplace of ideas protected by the First Amendment.

### **III. Defendants' Criticism of Plaintiffs' Litigation Is Unactionable Rhetorical Hyperbole and Opinion.**

#### **A. The Term "Patent Troll" Is Rhetorical Hyperbole.**

It would be difficult to find a term that more perfectly fits within the category of rhetorical hyperbole than "patent troll." The term is fanciful on its very face, making an allusion to mythical Norse entities. *See Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016 (1st Cir. 1988) (considering whether the term "Amazon" of Greek myth could be defamatory). Moreover, the term lacks any precise or universally accepted definition and thus is not capable of being proven true or false. As the Superior Court correctly concluded, where a term lacks a clear definition, and therefore is incapable of being proven true or false, it cannot carry defamatory meaning. *See* Opinion at 16-20; *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987).

Many sources have emphasized the loose and undefined nature of the "patent troll" term:

- "[A]ny effort to design a suitable definition of the term 'troll' is likely to lend credence to the view that the status as a troll is in the eye of the beholder." Ronald J. Mann, *Do Patents Facilitate Financing in the Software Industry?*, 83 Texas L. Rev. 961, 1023 (2005).
- "[A] widely accepted definition of a patent troll has yet to be devised." John M. Golden, *"Patent Trolls" and Patent Remedies*, 85 Tex. L. Rev. 2111, 2161, n.7 (2007).
- "[T]here is really no universally accepted definition of what a patent troll is" and "who is and who is not a patent troll is largely in the eye of the beholder." IP Watchdog, *Patent Trolls*, Aug 19, 2014, *URL supra at p. v.*
- "There is currently no commonly agreed-upon definition of who is and is not a patent troll, and the terms nonpracticing entity, patent assertion entity, and patent troll are often used interchangeably." Ashli Weiss, *An Insight into the Apparel Industry's Patent Troll Problem*, 6 Hastings Sci. & Tech. L.J. 121, 132 (2014).

- “Although the term ‘patent troll’ is now a near-household term, categorizing entities as such is no easy task due to the lack of a widely accepted definition.” Mateo J. de la Torre, *The Troll Toll: Why Liberalized Fee-Shifting in Patent Cases Will Do More Harm Than Good*, 101 Cornell L. Rev. 813, 824 (2016).

Since the term “patent troll” has no single, universally accepted definition, it has been used both broadly and narrowly. Most relevant to this case, the term is frequently used in a way that would include entities, like ATL, that are either owned or controlled by the original inventor of the relevant patents. To take a handful of examples:

- Patent trolls fall into “three general categories,” ranging from “individual owners of patented inventions that do not make a product but are suing a large corporation for infringement,” to “companies like Intellectual Ventures . . . that generates ideas for the purpose of patenting, with an eye towards eventually licensing those patents,” to “patent holding companies.” McDonough III, *supra*, 56 Emory L. J. at 192-93.
- While “[t]here is much debate and controversy over the term ‘patent troll’” the term should include “the individual inventor who tries to commercialize the invention, but fails, and then sues the industry years later.” TJ Chiang, *What is a troll patent and why are they bad?*, PatentlyO, March 6, 2009, *URL supra at p. v.*
- “The individual inventor could easily fit within some definitions of a patent troll—both are individuals who are non-producing and monetize their patents by seeking royalty arrangements with larger companies.” Christopher A. Cotropia, *The Individual Inventor Motif in the Age of the Patent Troll*, 12 Yale J. L. & Tech. 52, 56 (2010).
- NPEs, PAEs, “sometimes called ‘trolls’ by detractors,” can “include patentees that have turned their focus away from the active development or practice of their patents and have moved towards patent enforcement.” FTC, *Evolving IP Marketplace*, *supra* at 60-61.

Faced with the very inconvenient fact that “patent troll” has no universally accepted definition and is often used in a broad sense to refer to entities just like ATL, Plaintiffs have two responses. First, they dismiss broad definitions of “patent troll” as what a mere “law professor”

might think. *See Br. of Appellants* at 21. Second, they point to the defendants' discussions of the term "patent troll." *See id.* at 17, 24. Neither approach can save Plaintiffs' defamation claims.

Plaintiffs cannot simply dismiss broad definitions of "patent troll" that they do not like. The courts do not exist as a forum for one side of a debate to police the language of their opponents. *See Milkovich*, 497 U.S. at 20. Courts faced with similar claims have resisted efforts by defamation plaintiffs to impose their own definitions of terms. *See Bakal v. Weare*, 583 A.2d 1028, 1030 (Me. 1990) ("We reject [plaintiff's] approach that interprets the word 'threats' in the most negative possible way to mean threats of physical violence."); *Fudge*, 840 F.2d at 1016 ("we do not think plaintiffs are entitled to pick and choose from among the various possible definitions of 'amazon'").

Plaintiffs also find no support in the context of Defendants' statements. Plaintiffs point to purported definitions of "patent troll" offered by two Defendants. *See Br. of Appellants* at 17, 24 (citing a CUNA statement found at APP 32 and an ABA statement found at APP 62). Plaintiffs omit the crucial fact that neither of these definitions of "patent troll" excludes entities where the original inventor retains ownership or control. This is consistent with the term "patent troll" being capable of many meanings. According to Plaintiffs' own FAC, ATL acquired an exclusive interest in the relevant patents *after* Barcelou's failed efforts at commercialization and did so for the express purpose of patent assertion. *See* FAC ¶¶ 52-58. Thus, even if "patent troll" is given the definitions offered by CUNA or ABA, the Defendants' statements are substantially true according to Plaintiffs' own allegations. *See Riley v. Harr*, 292 F.3d 282, 296 (1st Cir. 2002) (common law of libel concentrates upon substantial truth); *Simpkins v. Snow*, 139 N.H. 735, 740 (1995).

Finally, Plaintiffs misunderstand both the context and legal significance of the Superior Court’s discussion of whether or not the term “patent troll” is a pejorative term. *See Br. of Appellants* at 21-22. The Superior Court was merely noting that, among the many and varied discussions of patent trolls, some commentators have presented the patent troll or PAE business model in a positive light. *See Opinion* at 18-19; *see also Part II. supra* (discussing the views of supporters of PAEs). The Superior Court was not claiming that “patent troll” is *never* used in a pejorative sense or even that the defendants did not use it pejoratively. *See Opinion* at 18 (noting that there are many definitions of “patent troll” and that “not *all* of them are *necessarily* pejorative”) (emphasis added). The fact that the term “patent troll” is sometimes used pejoratively does not make it capable of carrying defamatory meaning. *See Flowers v. Carville*, 310 F.3d 1118, 1127 (9th Cir. 2002) (“The law provides no redress for harsh name-calling.”); *Levinsky’s*, 127 F.3d at 130; *see also* Rodney A. Smolla, *Law of Defamation* § 4.8 (2d Ed. 2009) (“No matter how obnoxious, insulting, or tasteless such name-calling, it is regarded as a part of life for which the law of defamation affords no remedy.”).

The federal and state law reports are filled with cases where harsh, insulting, and pejorative language is found to be incapable of defamatory meaning. *See, e.g., Bellezza v. Greater Havre De Grace Yacht Club, Inc.*, Case No. 0367, 2015 WL 6394418, at \*8, n. 8 (Md. Ct. Spec. App. Oct. 22, 2015) (statement calling plaintiff a “loser” and an “asshole” were “precisely the kind of name-calling that does not amount to defamation”); *Stevens v. Mavent, Inc.*, No. CV 07-245, 2008 WL 2824956, at \*7 (C.D. Cal. July 21, 2008) (statement that plaintiff was “stupid” was not actionable); *Chang v. Cargill, Inc.*, 168 F. Supp. 2d 1003, 1011 (D. Minn. 2001) (same); *Ferlauto v. Hamsher*, 74 Cal. App. 4th 1394, 1404 (2d Dist. 1999) (statement calling plaintiff “creepazoid attorney” and “loser wannabe lawyer” was “classic rhetorical



hyperbole”); *Yeagle v. Collegiate Times*, 255 Va. 293, 297-298 (1998) (student newspaper’s description of plaintiff as “Director of Butt Licking” was rhetorical hyperbole and not actionable defamation); *Thomas v. News World Commc’ns*, 681 F. Supp. 55, 63-64 (D.D.C. 1988) (article calling anti-nuclear protesters “‘bum[s],’ . . . ‘pitiab[le] lunatic[s],’ ‘deluded,’ and ‘insane’” was nonactionable rhetorical hyperbole). The question on appeal is not whether the term “patent troll” is generally used in a pejorative sense; rather, the question is whether it has a sufficiently precise definition to be defamatory. *See Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996); *McCabe*, 814 F.2d at 842. The Superior Court correctly concluded that it does not. *See* Opinion at 16-20.

**B. Defendants’ Harsh Criticism of Plaintiffs’ Litigation Campaign Is Unactionable Opinion.**

Disputes over litigation often give rise to strong invective between the parties. *See, e.g., Live Face on Web, LLC v. Five Boro Mold Specialist Inc.*, No. 15 CV 4779-LTS-SN, 2016 WL 1717218, at \*1 (S.D.N.Y. Apr. 28, 2016); *Mattel, Inc. v. MCA Records, Inc.*, 28 F. Supp. 2d 1120, 1159 (C.D. Cal. 1998); *see also* Smolla, Law of Defamation, *supra* § 4.8. If strong criticism of a litigation opponent was generally actionable as defamation, the courts would be filled with litigation much like the present suit.

The Superior Court correctly found Defendants’ language, such as “shakedown,” “extortion,” and “blackmail,” to be non-actionable opinion. Opinion at 20-21. In context, all of Defendants’ challenged statements refer to, and characterize, ATL’s *patent litigation* campaign. *See* FAC ¶¶ 68, 77, 79. None of Defendants’ statements can, even on the most tendentious reading, be understood to charge Plaintiffs with criminal conduct. *See Bourne v. Arruda*, No. 10-CV-393-LM, 2011 WL 2357504, at \*5 (D.N.H. June 10, 2011) (statement calling litigant a “terrorist” was non-actionable hyperbole); *Mattel*, 28 F. Supp. 2d at 1159 (statement that

litigant's conduct was "akin to bank robbery" could not be read to accuse opponent of a crime); *see also Greenbelt*, 398 U.S. at 14 (1970) (characterization of local real estate developer's negotiations with city council as "blackmail" was non-actionable rhetorical hyperbole). Similarly, the statement that patent trolls have asserted "overly broad patents," *see* FAC ¶ 81, is non-actionable opinion. *See Scholastic, Inc. v. Stouffer*, 124 F. Supp. 2d 836, 850 (S.D.N.Y. 2000) (statements that copyright claims were "absurd," "ridiculous" and "meritless" non-actionable statements of opinion)<sup>6</sup>, *Ferlauto*, 74 Cal. App. 4th at 1403 (characterizations of lawsuit and motion as "stupid," "laughed at," "a joke," and "frivolous," were nonactionable hyperbole).

Among all of the statements made by the defendants, Plaintiffs' brief does identify one, and only one, very minor *factual* error. CUNA misstated the Federal Circuit's ruling, writing that the appeals court had "invalidated 7 of 13 patents" asserted by ATL. *See Br. of Appellants* at 8. The relevant statement, which is a single line in a 16 page PowerPoint presentation, can be found at page 37 of the Appendix.<sup>7</sup> CUNA's statement was incorrect because the Federal Circuit invalidated seven *claims* from the '457 patent, not seven of ATL's patents. *See In re Transaction Holdings*, 484 F. App'x at 471-73. This claims/patents error was not alleged anywhere in Plaintiffs' First Amended Complaint. Nor, under the doctrine of substantial truth, is it actionable. *See Fecteau v. George J. Foster & Co.*, 120 N.H. 406 (1980). Defamation law does not concern itself with "minor inaccuracies." *Riley*, 292 F.3d at 296.

CUNA's claims/patents error must be understood in context. The Federal Circuit found seven claims of '457 patent invalid as obvious. *See In re Transaction Holdings*, 484 F. App'x at

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<sup>6</sup> An unrelated holding in *Scholastic* regarding the Lanham Act was abrogated by the Supreme Court in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). *See Atrium Grp. De Ediciones Y Publicaciones, S.L. v. Harry N. Abrams, Inc.*, 565 F. Supp. 2d 505, 513 (S.D.N.Y. 2008).

<sup>7</sup> Plaintiffs' brief incorrectly cites APP 32.

471-73. The '457 patent is the original patent issued to Barcelou. *See* FAC ¶ 55. The Federal Circuit did not rule on the validity of the four other ATL patents before it in that appeal. *See In re Transaction Holdings*, 484 F. App'x at 471. But the appeals court did note that all five of the ATL patents on appeal “share the same specification and have very similar claims.” *Id.* The claims invalidated by the Federal Circuit included claims 1 and 9 of the '457 patent, which the appeals court expressly identified as “representative” of asserted claims from *all* of the patents. *Id.* In this context, an already very minor error is shown to be even less significant. Courts routinely reject defamation claims founded on small mistakes like this. *See Nichols v. Moore*, 396 F. Supp.2d 783 (E.D. Mich. 2005) (statement that man was arrested after bombing not defamatory when he had been held as a material witness); *Ferlauto*, 74 Cal. App. 4th at 1404 (mistakenly calling motion for preliminary injunction a motion for summary judgment was “of no consequence” because libel law “overlooks minor inaccuracies”); *Koniak v. Heritage Newspapers, Inc.*, 198 Mich. App. 577 (1993) (statement that a man sexually assaulted his stepdaughter 30-50 times, not defamatory when the stepdaughter testified he had done so only 8 times).


## CONCLUSION

Plaintiffs may believe that their actions, as inventors and as patent litigants, should be praised rather than criticized. They are fully entitled to hold that view. But they cannot use the court system to punish those that do not share their opinions. Critics of patent owners, like all participants in public debate, are allowed to deploy the “imaginative expression” and “rhetorical hyperbole” which “has traditionally added much to the discourse of our Nation.” *Milkovich*, 497 U.S. at 20. *Amici curiae* ALCU-NH and EFF respectfully ask the Court to affirm the judgment of the Superior Court.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire &  
Electronic Frontier Foundation

By their Attorney,



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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Amicus Brief of the ACLU of New Hampshire and Electronic Frontier Foundation in Support of Appellees was served this 17<sup>th</sup> day of September, 2018 by first class mail, postage prepaid, and by electronic mail on counsel listed below:


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