No. 18-2143

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2019

ELMORE LANSFORD, Petitioner,

v.

SILVIA COURTIER, Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF TENLEY

BRIEF FOR PETITIONER

Team 219531
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether Respondent is libel-proof based solely on her prior, prolonged and nefarious criminal lifestyle, including five separate juvenile delinquency adjudications and a two-year prison sentence for possession of cocaine, when she currently maintains a lifestyle as a successful entrepreneur with an overwhelming following on social media and in her community?

II. Whether Mr. Lansford's exaggerated and figurative statements constitute rhetorical hyperbole when written using language such as "leech," "whore," and "swindler" to describe Respondent, and whether a reasonable person would read his passionate response to Respondent's insults towards his community involvement and political accomplishments as an assertion of fact?

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A formal statement of jurisdiction has been omitted in accordance with the Rule of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

STATEMENT OF THE CASE

Statement of the Facts

At ten-years-old, Respondent began her long-lived criminal career. (J.A. at 5). Respondent was declared delinquent for a myriad of offenses as a juvenile, including "simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine." (J.A. at 15). Later, Respondent was "incarcerated at a boot camp for young female offenders." *Id.* As an adult, Respondent "maintained a criminal lifestyle." *Id.* In her early twenties, Respondent "was arrested for possession and distribution of cocaine." (J.A. at 15-16). Once again, Respondent landed herself in state prison for two years after pleading guilty to possession of cocaine. (J.A. at 16).

After Respondent was released from prison, she earned her business degree and opened a small clothing store. (J.A. at 5, 16). She later expanded her clothing business and gained consumers akin to "high-end designers like Fendi, Chanel, Gucci, Louis Vuitton, and others." (J.A. at 16). Eventually, Respondent married Raymond Courtier, the then-mayor Silvertown. (J.A. at 2, 5, 15). Courtier held office for eighteen consecutive years until his death, (J.A. at 2), after which Mr. Lansford took office, (J.A. at 3, 16).

In recent years, Respondent has gained serious notoriety through social media platforms. (J.A. at 2, 16). Respondent advocates on public online platforms "against private-for-profit prisons, and in favor of restoring voting rights for former felons." (J.A. at 16). Among a few other political positions, Respondent has "use[d] her sizable social media presence to advocate" against "gentrification and the elimination of affordable housing." *Id.*

As the current mayor of Silvertown, Mr. Lansford has encouraged the progressive development of his city, including supporting new, sophisticated housing projects and criminal justice reform. (J.A. at 3, 16). To improve the quality of life in Silvertown, Mr. Lansford

"campaigned on a 'tough-on-crime' platform," becoming known for the slogan "Cleaning up Cooperwood." *Id.*

Respondent's attacks on Mr. Lansford began when her most recent lobbying prospect, Evelyn Bailord, ran against Mr. Lansford for mayor. (J.A. at 3, 17). Respondent had "contributed substantially to Bailord's campaign" and "hosted several black-tie dinner affairs" on her behalf. *Id.* To the dishonor of her husband's positive and long-time friendship and political alliance with Mr. Lansford, Respondent began to criticize Mr. Lansford on her website. *Id.* In her malicious, hypocritical verbal assault on Mr. Lansford and his work as mayor, Respondent posted:

> Lansford's time is past. He was once a caring politician, but now he is simply an entrenched incumbent; beholden to special interests. He has engaged in a war on the economically-strapped denizens of Cooperwood, imposing more and more police patrols. His repressing measures contribute to the process of gentrification and the displacement of Cooperwood residents to other neighborhoods or other cities.
>
> In short, Mayor Lansford is a plutocrat. He needs to be replaced by a compassionate politician, one who cares about all people of all races, genders, and ethnicities.

(J.A. at 3-4, 17). Respondent's patronizing comment also asserted that Mr. Lansford "is out of touch with 21st century America and the need for social justice." *Id.* In a final blow, Respondent said it is time for "Out with the Old and In with the New." *Id.*

Distraught by Respondent's offensive strike against him, Mr. Lansford responded, albeit unpleasantly, to clear his reputation. (J.A. at 4, 17-18). Mr. Lansford noted:

> It is ironic that Silvia Courtier blasts me as uncaring toward the less fortunate. No wonder she is a coddler of criminals. In her early years, Silvia Courtier was a lewd and lusty lush, a leech on society, and a woman who walked the streets strung out on drugs. She is nothing more than a former druggie.
>
> It is also ironic that she casts herself as the defender of the less fortunate. Last time I checked, she is the proprietor of a bunch of upscale, hoity-toity clothing stores that are lacking in class and substance. How ironic that she pimps out these clothes to the rich and lavish. She is corrupt and a swindler, who hoodwinks the poor into

> thinking she is some kind of modern-day Robinita Hood. I guess she learned something from the streets.
>
> Now, this businesswoman is a pimp for the rich and a whore for the Poor. What a Joke!

Id. In spite of her initiation of the verbal mudslinging, Respondent initiated this action against Mr. Lansford, challenging the phrases "a pimp for the right," "a leech on society," "a whore for the poor," and "corrupt and a swindler." (J.A. at 4-5, 18).

Procedural History

Respondent filed suit against Mr. Lansford, alleging defamation of character and false light invasion of privacy (J.A. at 4). Mr. Lansford filed a special motion to strike/dismiss Respondent's suit pursuant to the Tenley Citizen's Public Participation Act. (J.A. at 2). The United States District Court for the District of Tenley correctly granted Mr. Lansford's motion to strike/dismiss the defamation claim, holding that his post was protected under the First Amendment as rhetorical hyperbole, (J.A. at 13), but wrongly held that Respondent was not libel-proof, (J.A. at 11). Respondent timely appealled to the Supreme Judicial Court of Tenley. (J.A. at 14). On appeal, the court incorrectly reversed the lower court's decision to grant the dismissal of Respondent's defamation claim because questions remained whether Mr.Lansford's post went beyond rhetorical hyperbole to call into question Repsondent's competence and professionalism. (J.A. at 23). The appeals court also incorrectly affirmed the lower court's finding that Respondent was not libel-proof. (J.A. at 19). This Court granted certiorari for the October term of 2019. (J.A. at 24).

SUMMARY OF THE ARGUMENT

This case is about preserving this nation's deep-rooted First Amendment right to engage in political discourse without fear of retaliation and chilling of speech. To shield the corrosion of this fundamental principle, several federal and state courts have adopted the libel-proof plaintiff

doctrine, which recognizes that a plaintiff will not succeed on a civil libel suit if his or her reputation is so tarnished due to criminal or bad conduct that the possibility of recovering more than nominal damages is unlikely. Courts have consistently applied the libel-proof plaintiff doctrine in cases where the defendant can provide evidence of a plaintiff's incessant and habitual criminality. Further, in finding that a plaintiff is libel-proof, courts have generally disregarded evidence of a plaintiff's rehabilitation, and, as follows, have also deemed irrelevant how far in the past the criminal or bad conduct occurred. Here, Respondent's nefarious and long-lived criminal past, coupled with her overwhelming following on social media and in her community, renders her libel-proof. The fact that Respondent's criminal conduct transpired in the past, or that Respondent has become a successful businesswoman since her decades-long foray as a egregious criminal, is immaterial. Thus, this Court should hold that Respondent is libel-proof and reverse the lower court's decision.

Our founders enumerated the First Amendment to protect the most vital aspect of a democratic society, the free exchange of ideas and concepts. This protection has been broadly defined and applied by this Court, with few, narrow exceptions. Rhetorical hyperbole serves as the inverse of actionable defamation, falling into a class of expression protected by this Court. The gravamen of rhetorical hyperbole is whether a statement could be read by an ordinary person as containing an assertion of fact. Thus, looking at the use of loose, figurative language, and the context in which the hyperbole arose is necessary for holistic consideration of whether a statement is protected speech. The more exaggerated or outlandish the diction of a statement is, the less likely it is that a reasonable person would perceive it to be factual. This exaggeration negates any claim of actionable defamation because by nature a statement no one believes to be true cannot be injurious to the reputation of a person.

Looking to this case, it is clear that Mr. Lansford's post in response to Respondent's attack on his personal and professional history constituted rhetorical hyperbole. His post was written in loose, exaggerated language to raise objections to Respondent's allegations, and were presented with a tone of frustration and incredulity. Additionally, the scope of heated political debates has historically left room for statements against opponents which, while may not be polite, are nevertheless protected speech, therefore the context of Mr. Lansford's post as a response to Respondent's smear of his political and professional accomplishments appropriately falls into this protection. The result of this Courts evaluation of the relative hyperbolic nature of Mr. Lansford's statements should be that no reasonable reader would perceive Mr. Lansford's post to be asserting facts about Respondent, causing Respondent's defamation claim fails as a matter of law. Thus, this Court should reverse the lower court's decision.

ARGUMENT

Standard of Review

"[F]ederal courts engage in de novo review when mulling defamation issues that are tinged with constitutional implications." *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 127 (1st Cir. 1997). The determination of whether a statement is opinion or rhetorical hyperbole as opposed to a factual representation is a question of law for the court. *Davis v. Ross*, 754 F.2d 80 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984) (en banc).

I. RESPONDENT IS LIBEL PROOF BECAUSE HER NEFARIOUS AND LONG-LIVED CRIMINAL PAST INDEPENDENTLY JUSTIFIES THE APPLICATION OF THE LIBEL-RPOOF PLAINTIFF DOCTRINE, AND IT IS IMMATERIAL WHETHER THE CRIMINAL CONDUCT OCCURRED IN THE PAST OR THE RESPONDENT SHOWS EVIDENCE OF REHABIILITATION.

The First Amendment right to free speech has long served as a constitutional safeguard to "assure unfettered interchange of ideas" in political and social discourse. *Roth v. United States*,

354 U.S. 476, 484 (1957). To further preserve the First Amendment's grip on freedom of expression, numerous state and federal courts have either adopted or referred to the libel-proof plaintiff doctrine. *See Brooks v. American Broadcasting Co.*, 932 F.2d 495, 500 (6th Cir. 1991). Federal and state courts have routinely recognized under the issue-specific libel-proof plaintiff doctrine that, in a civil libel suit, a plaintiff may be "so unlikely by virtue of [a] life as a habitual criminal to be able to recover anything other than nominal damages."[1] *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 639 (2d Cir. 1975). Accordingly, the doctrine considers whether a plaintiff's reputation is tarnished as a result of a well-known participation in certain criminal or bad conduct, such that any subsequent defamatory statements can cause no substantial injury. *See Cerasani v. Sony Corp.*, 991 F. Supp. 343, 352-54 (S.D.N.Y. 1998); *Wynberg v. National Enquirer, Inc.*, 564 F. Supp. 924, 927-29 (C.D. Cal. 1982). In such cases, "First Amendment considerations of free press and speech, promoting society's interest in uninhibited, robust, and wide-open discussion, must prevail over an individual's interest in his reputation." *Wynberg*, 564 F. Supp. at 928.

In applying the libel-proof plaintiff doctrine, the evidence on "the nature of the conduct, the number of offenses, and the degree and range of publicity received" should demonstrate that an "individual's reputation for specific conduct, or his general reputation for honesty and fair dealing is sufficiently low in the public's estimation." *Id.*; *see also McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6, 10 (Tex. App. 1994) ("To justify applying the doctrine, the evidence . . . must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from the publication of the false and libelous statement."). Here, Respondent is libel-proof

[1] This Court rejected another manifestation of the libel-proof plaintiff doctrine, known as the incremental harm doctrine, in *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496 (1991). This Court held that the incremental harm doctrine is not "compelled as a matter of First Amendment protection for speech," although state courts are free to accept the doctrine to allow a defendant to show that certain statements did not cause incremental harm to a plaintiff's reputation. *Masson*, 501 U.S. at 523.

largely because of her enduring and nefarious criminal past, which is easily accessible by way of public court records and documents. Clearly a "habitual criminal," Respondent's disregard for the integrity of the criminal justice system and basic human decency for well over a decade renders her reputation so tarnished that her civil libel suit against Mr. Lansford is undeserving of judicial resources. Therefore, the application of the libel-proof doctrine is appropriate against Respondent, and the lower court's decision should be reversed.

A. Respondent's previous felony conviction and litany of juvenile offenses, which are publicly available via court records, render her libel-proof because they are evidence of habitual criminality and a tarnished reputation that, coupled with Respondent's general present-day fame, justify the preservation of First Amendment principles of free speech.

Generally, the application of the libel-proof plaintiff doctrine hinges in part on a certain degree of publicity attendant to a plaintiff's bad conduct. *See Wynberg*, 564 F. Supp. at 928. The element of publicity, however, has been broadly interpreted to include either media coverage or publicly accessible criminal records. *See Cardillo*, 518 F.2d at 639-40; *Cofield v. Advertiser Co.*, 486 So.2d 434 (Ala. 1986); *Cerasani*, 991 F. Supp. at 353-54. When the libel-proof plaintiff doctrine is applied to individuals engaged in "anti-social or criminal behavior," and thus "suffer[] a diminished reputation," he or she is libel-proof "as it relates to that specific behavior." *Wynberg*, 564 F. Supp. at 928. Because Respondent's established and long-lived criminal career renders her libel-proof, this Court should reverse the decision of the Supreme Judicial Court of State of Tenley.

1. A criminal record that is publicly accessible and demonstrates a perpetual disregard for the law supports the application of the libel-proof plaintiff doctrine, even if there is no attendant media publicity.

Evidence of continuous and habitual participation in criminal activities alone can support the application of the libel-proof plaintiff doctrine. *See Cardillo*, 518 F.2d at 639-40. In the seminal case of *Cardillo*, the Second Circuit held that the plaintiff, who was "serving 21 years [and] sentenced for assorted federal felonies," was libel-proof. *Id.* at 640. Notably, the only publicity

related to the plaintiff's criminal activity was the alleged source of the libelous statements itself. *Id.* at 639. The Second Circuit looked to the plaintiff's extensive criminal past, which included a record for stealing securities, bail-jumping, receiving stolen property, and fixing races by "slowing down the favorites with drug injections." *Id.* at 640. The plaintiff was also notorious for frequenting areas where the mob was present. *Id.* The plaintiff's poor "record and relationships or associations" were enough on their own to find the plaintiff to be libel-proof. *Id.* The Second Circuit ultimately held that "by virtue of [the plaintiff's] life as a habitual criminal," he would be unlikely to "recover anything other than nominal damages." *Id.* at 639. Relying on the holding in *Cardillo*, a similar result ensued in *Cofield*, where the Supreme Court of Alabama held that the plaintiff was libel-proof because his "five separate convictions of theft offenses, four of them on pleas of guilty," were undisputed and, thus, First Amendment considerations trumped the value of his civil libel suit. 486 So.2d at 435. Notwithstanding the publication at issue in the case, it was the plaintiff's record as a habitual criminal alone that the court found to be enough to deem the plaintiff libel-proof. *Id. But cf. Thomas v. Telegraph Pub. Co.*, 929 A.2d 991, 1005 (N.H. 2007) (holding that the plaintiff was not libel proof because he had "received little media attention regarding his prior arrests and convictions"); *McBride*, 894 S.W.2d at 10 (stating that application of the doctrine requires that a plaintiff's "activities were widely reported to the public").

In applying the libel-proof plaintiff doctrine, courts have recognized that the element of publicity stems in part from the inherently public nature of a criminal record. *See Davis v. McKenzie*, No. 16-62499, 2017 WL 8809359, at *5-6 (S.D. Fla. Nov. 3, 2017); *Cerasani*, 991 F. Supp. at 353-54. In *Cerasani*, the District Court for the Southern District of New York held that the plaintiff was libel-proof with respect to violent, criminal conduct in large part because of the public nature of his extensive criminal record, which was rightfully at the court's disposal in

making its libel-proof determination. 991 F. Supp. at 353-54. While "the doctrine is not limited to plaintiffs with criminal records," the court held that the plaintiff's tarnished reputation clearly stemmed from his slew of convictions and ongoing indictments. *Id.* The court ultimately permitted a cinematic depiction of the plaintiff "viciously beating a driver during a truck hijacking, brutally beating the maître d' of a Japanese restaurant, and participating in [a] gruesome murder." *Id.* at 346. Similarly, in a recent opinion by the District Court for the Southern District of Florida that found the plaintiff to be libel-proof, the court noted that "the information pertinent . . . is readily accessible 'by way of court records and other information in the public domain.'" *Davis*, 2017 WL 8809359, at *5. Taking "judicial notice of the publicly available transcripts and other filings from [the plaintiff's] criminal proceedings," the court held that the plaintiff had no valid libel claim with respect to a television broadcast depicting him as a trafficker who was physically and sexually abusive. *Id.* at *1, *5-6. Both the *Cerasani* and *Davis* courts relied heavily on the availability of public criminal records to justify, in part, the application of the libel-proof plaintiff doctrine. *Id.* at *5; *Cerasani*, 991 F. Supp. at 353-54. *See also Sharon v. Time Inc.*, 575 F. Supp. 1162, 1171-72 (D.R.I. 1983) (holding that the Minister of Defense of the State of Israel was not libel-proof because he had no public criminal record and "the effects on [his] reputation . . . cannot as a matter of law be equated with the effects normally imputed to verdicts in criminal cases").

In the case at hand, Respondent is libel-proof because of her decades-long criminal history alone, which clearly demonstrates that she is a "habitual criminal" who would be "unlikely . . . to recover anything other than nominal damages." *Cardillo*, 518 F.2d at 639. As in *Cardillo* and *Cofield*, where the plaintiffs were declared to be libel-proof where virtually no publicity was involved but both had criminal records, Respondent has a "litany of offenses" that justify the application of the libel-proof plaintiff doctrine in this case. (J.A. at 15). As a juvenile, Respondent

was charged with "simple assault, simple possession of marijuana, indecent exposure, vandalism, and possession of cocaine." *Id.* Respondent also "stole money from grocery stores." (J.A. at 5). Later, after she was released from a boot camp for female juvenile offenders, she "maintained her criminal lifestyle" and was "arrested for possession and distribution of cocaine." (J.A. at 15-16). She subsequently served two years in prison. J.A. at 16. Respondent's criminal career lasted well over ten years, from the age of ten to at least her early 20s. (J.A. at 5).

Respondent's criminal history is far worse than that of the plaintiff held to be libel-proof in *Cofield*, who had only five convictions for theft. *Cofield*, 486 So.2d at 435. Respondent's serious criminal record is akin to that of the plaintiff in *Cardillo*, who also maintained a criminal lifestyle involving crimes of theft and variations of drug use and possession. 518 F.2d at 639-40. Like the plaintiff in *Cardillo*, who the Second Circuit classified as a "habitual criminal," *id.* at 640, Respondent engaged in criminal, and at one point violent, behavior for much of her young adult life, including theft and drug use, (J.A. at 5, 15-16). Unlike *Cardillo*, however, where the plaintiff was sentenced after one single judicial proceeding, 518 F.2d at 640, Respondent continued to accumulate criminal charges even after several confrontations with criminal justice system, receiving two separate sentences, (J.A. at 5, 15-16), making her even more of a "habitual criminal" than the plaintiff in *Cardillo*. Thus, because Respondent's criminal record is worse than those of the plaintiffs in *Cardillo* and *Cofield*, this Court should reverse the lower court's decision and find that Respondent is libel-proof by virtue of being a "habitual criminal" who defied the criminal justice system for much of her young adult life.

Respondent's criminal record is inherently public and renders the application of the libel-proof doctrine appropriate as it pertains to her criminal tendencies. Like *Cerasani*, where the court relied on the public accessibility of the plaintiff's criminal record to justify disturbing depictions

of him committing murder and other violent acts, 991 F. Supp. at 346, 353-54, Respondent's public criminal record is similarly at the disposal of this Court to find that Mr. Lansford's statements cannot sustain a claim for libel. (J.A. at 4, 5, 15-16). Further, the *Davis* court's emphasis on the public availability of "pertinent" criminal charges to find the plaintiff libel-proof, 2017 WL 8809359, at *5-6, supports a finding that Respondent's inherently public criminal record also makes her libel-proof, (J.A. at 5, 15-16). Because the *Cerasani* and *Davis* courts applied the libel-proof plaintiff doctrine by placing a strong emphasis on the plaintiffs' public criminal records, this Court should similarly hold that Respondent is libel-proof with respect to her criminal convictions because they are accessible and known via public court records and documents.

2. The libel-proof plaintiff doctrine can apply when a plaintiff has a past criminal record and general public fame unrelated to prior criminal acts.

A plaintiff's past or ongoing participation in criminal activities coupled with a general popularity among the public renders the application of the libel-proof plaintiff doctrine appropriate. *See Wynberg*, 564 F. Supp. at 928-29. In *Wynberg*, the District Court for the Central District of California held that the plaintiff was libel-proof because of his "past conduct and criminal convictions," but the court also gave weight to the fact that the plaintiff "actively solicited publicity." *Id.* at 927-29. The plaintiff had five criminal convictions that, although discussed in the news, were unknown to his acquaintances. *Id.* at 928. Apart from his criminal record, the plaintiff also received "substantial publicity" by virtue of his relationship with actress Elizabeth Taylor. *Id.* at 929. Because of Taylor's prominent celebrity status, stories on hers and plaintiff's relationship and the plaintiff's life generally were regularly in the press and newspapers. *Id.* In holding that the plaintiff was libel-proof, the court not only considered the plaintiff's criminal record, but also that, as a result of his acquired celebrity status, the plaintiff received general publicity that weakened

his libel claim as it related to publications stating that he swindled and exploited Taylor for money. *Id.* at 928-29.

Here, Respondent's past criminal conduct, coupled with her general notoriety among the public as a successful businesswoman, social activist, and widow of a mayor, make her libel-proof. Like the plaintiff in *Wynberg*, whose past criminal convictions and publicity he gained as a result of his relationship with actress Elizabeth Taylor rendered him libel-proof, 564 F. Supp. at 927-29, Respondent's extensive criminal past functions in conjunction with her general popularity among the public, (J.A. at 2, 15). Also like the plaintiff in *Wynberg*, who gained enough notoriety through his relationship with Taylor to receive considerable press coverage, 564 F. Supp. at 929, Respondent was well-known through her marriage with Tenley's former mayor and her successful "line of clothing stores that cater to consumers of high-end designers like Fendi, Chanel, Gucci, Louis Vuitton, and others," (J.A. at 2, 5, 15-16). Further, in *Wynberg*, the plaintiff gained prominence mainly from reports in newspapers and other popular media outlets at the time, which, given the several-decade gap, is virtually similar to Respondent's prominence gained as a result of her vigorous campaigning and public advocacy "against private, for-profit prisons" and for "restoring voting rights for formers felons," as well as her "sizable social media presence." (J.A. at 16). Thus, this Court should hold that Respondent is libel-proof because her libel claim against Mr. Lansford is undermined by her past criminal conduct and general fame.

B. Respondent is libel-proof even though her criminal career is in the past and she has since shown evidence of rehabilitation through altruistic and philanthropic efforts.

The libel-proof plaintiff doctrine applies to past criminal conduct regardless of any evidence of rehabilitation to the plaintiff's reputation. *See Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004); *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 304 (2d Cir. 1986). Namely, the libel-proof plaintiff doctrine is applicable to criminal or reprehensible conduct regardless of

the time lapsed since that conduct occurred. *See Lamb*, 391 F.3d at 1139; *Guccione*, 800 F.2d at 304. Evidence of rehabilitation, moreover, is generally immaterial to the libel-proof analysis when the plaintiff's criminal or bad conduct spanned the course of many years and the plaintiff has since done nothing to conceal it. *See Guccione*, 800 F.2d at 302, 304.

1. The time lapsed since a plaintiff's criminal or bad conduct is irrelevant to a libel-proof analysis.

A plaintiff can be libel-proof even if the criminal or bad conduct that damaged his or her reputation occurred in the past. *See Lamb*, 391 F.3d at 1139 ("[I]t matters not that thirty-one years [have] passed since . . . 'the only crime that could have labeled [him] libel-proof.'"). In *Lamb*, the Tenth Circuit held that the plaintiff, who had at the time of the court's opinion had been imprisoned for over thirty years, was libel-proof because he had "already suffered from a lowered reputation in the community [due to his] *prior* convictions for the crime alleged in the publication or for a similar crime." *Id.* (emphasis in original). The Tenth Circuit concluded that the lapse of thirty-one years since the plaintiff's heinous criminal conduct at issue did not affect its decision to label the plaintiff libel-proof. *Id.*

Evidence of a plaintiff's recurring bad or criminal conduct from the past is relevant to a libel-proof determination. *See Guccione.*, 800 F.2d at 304. In *Guccione*, the Second Circuit held that the plaintiff was libel-proof because his reputation was so badly tarnished with respect to his notoriety for adultery. *Id.* The Second Circuit considered evidence dating back to the early- to mid-1970s, over a decade prior to the allegedly libelous statements at issue, because it was probative of the plaintiff's conduct "while it was occurring." *Id. See also Davis*, 2017 WL 8809359, at *5 (considering evidence of the plaintiff's criminal record from ten years prior); *Brooks v. American Broadcasting Co.*, 932 F.2d 495, 501 (6th Cir. 1991) (noting that courts have "admitted articles published as must as five to eight years before the fact, to show that a plaintiff is libel-proof").

Additionally, the court held weight to the fact that the plaintiff "made no attempt to conceal [adulterous conduct] from the general public." *Id.* at 302.

The fact that Respondent's criminal conduct occurred in the past does not preclude the application of the libel-proof plaintiff doctrine, nor does it prohibit evidence of Respondent's criminal past to be introduced in the record. The plaintiff in *Lamb* was found to be libel-proof a staggering thirty-one years after the bad conduct at issue occurred, 391 F.3d at 1139, and, although the record is unclear as to Respondent's age at the time of this litigation, it is clear that Respondent began a criminal career as early as ten years old that continued into "her early 20s," (J.A. at 5). *Lamb* makes clear, however, that the time passed since Respondent's criminal career remains immaterial to whether she is libel-proof, and her past criminal conduct itself remains incredibly pertinent to the analysis. 391 F.3d at 1139. The *Guccione* court affirmed this principle by admitting and considering evidence of the plaintiff's criminal conduct from over a decade prior to the challenged statements, 800 F.2d at 304, and this Court should do the same with respect to Respondent's criminal record that began when she was approximately ten years old, (J.A. at 5). Further, like how the plaintiff in *Guccione* did not attempt to conceal his past bad conduct, 800 F.2d at 302, Respondent has made no attempt to conceal her criminal past, instead openly and publicly advocating for rights for former felonies and prison reform, (J.A. at 16). Because precedent clearly establishes that past criminal conduct occurring even decades prior to the alleged libelous statements remains relevant to a libel-proof determination, and Respondent's past criminal conduct meets the libel-proof threshold, this Court should reverse the decision of the lower court and hold that Respondent is libel-proof.

2. Evidence of a plaintiff's rehabilitation since the criminal conduct at issue does not preclude the application of the libel-proof plaintiff doctrine.

A plaintiff can still be libel-proof even if the plaintiff shows evidence that his or her bad reputation has been restored or rehabilitated. *See Lamb*, 391 F.3d at 1135 (holding that plaintiff was libel-proof even though he presented evidence that "his reputation had been rehabilitated and that he was no longer libel-proof"); *Guccione*, 800 F.2d at 304 (holding that it was untenable to "maintain that [the plaintiff], though libel-proof as to adultery from 1966 to 1979, somehow succeeded in restoring his reputation"). In *Lamb*, the plaintiff presented evidence that "his reputation had been rehabilitated," including "letters from various individuals who had recommended he be paroled." 391 F.2d at 1135. Despite this evidence, the Tenth Circuit noted that the libel-proof plaintiff doctrine requires a court to look at *prior* bad or criminal conduct, ultimately holding that the plaintiff was libel-proof even though the conduct in question occurred thirty-one years prior. *Id.* at 1139. Similarly, in *Guccione*, the Second Circuit concluded that the plaintiff's reputation was so injured that it could not possibly have been restored in the four years before the allegedly libelous statement. 800 F.2d at 304. The plaintiff had maintained a poor reputation for too long a duration prior to his self-purported rehabilitation for the court to reasonably find that his reputation had been restored. *Id. See also Davis*, 2017 WL 8809359, No. 16-62499, at *10 (rejecting the plaintiff's evidence that he once had a favorable reputation and participated in positive activities in high school and college prior to his convictions and concluding that plaintiff was libel-proof).

Respondent's former criminal career still renders her libel-proof even though in recent years she has become a successful entrepreneur and social activist. Like the plaintiff in *Lamb*, who attempted to introduce evidence of rehabilitation in the form of instances of good conduct, 391 F.2d at 1135, Respondent argues that her devotion to "altruistic, charitable, and philanthropic

efforts" dismantles the requisite foundations of the libel-proof plaintiff doctrine, (J.A. at 21). However, the court in *Lamb* indicated that, when the evidence of prior criminal conduct strongly favors the libel-proof plaintiff doctrine because the plaintiff's reputation has been so significantly tarnished, evidence of rehabilitation is inconsequential. 391 F.2d at 1139. Thus, like *Lamb*, Respondent's current non-criminal, dignified lifestyle is not pertinent to whether she is libel-proof given her extensive criminal career in the past. Similarly, like *Guccione*, where the plaintiff was held to be libel-proof because he maintained a poor reputation for too long a duration prior to his claimed rehabilitation, 800 F.2d at 304, Respondent's criminal career spanning well over a decade makes her libel-proof because it is not reasonable to find that Respondent's recent alleged rehabilitation sufficiently restores her reputation, (J.A. at 5). Like in *Lamb* and *Guccione*, Respondent's criminal past of theft, possession of cocaine and marijuana, distribution of cocaine, assault, indecent exposure, and vandalism remains far too nefarious to find that her reputation has been rehabilitated. (J.A. 5, 15-16). Thus, because the lower court improperly concluded that Respondent was rehabilitated and, therefore, the libel-proof plaintiff doctrine could not apply to her, this Court should reverse that finding and find that Respondent is libel-proof.

II. MR. LANSFORD'S STATEMENTS CONSTITUTE RHETORICAL HYPERVOLE BECAUSE THE STATEMENTS MADE, WHEN CONSIDERING THE THE CONTEXT, CIRCUMSTANCE, AND LOOSE, FIGURATIVE LANGUAGE OF THE POST, WOULD NOT LEAD AN ORDINARY READER TO PRESUME THE STATEMENTS ASSERTED ACTUAL FACTS.

The First Amendment, as one of our most revered constitutional traditions, states that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. Freedom of expression as enumerated in the First Amendment, necessary for maintaining

spaces for vigorous discourse and debate in America, has firmly established guidelines distinguishing protected from unprotected speech.[2] As one of the most challenged iterations of speech, defamation actions are frequently raised as an exception to free expression and are premised by the argument that some expression is not an "essential part of any exposition of ideas, and are of such slight social value [that any] benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

This Court has held that the Constitution provides absolute protection for rhetorical hyperbole, defined as "statements which could not reasonably be interpreted as stating actual facts about an individual." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). This is in part to ensure that public debate will not suffer for lack of imaginative expression, and to support the rhetorical hyperbole which has "traditionally added much to the discourse of our nation." *Id.* Therefore, any actionable claims must be interpreted against "a profound national commitment that debate on public issues must be uninhibited, robust, and wide open." *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). To protect these interests, courts must first determine whether allegedly defamatory statements actually constitute rhetorical hyperbole and, thus, are absolutely

[2] Restrictions on freedom of speech are typically classified into two categories: content-based or content-neutral. Content-neutral regulations are analyzed under intermediate scrutiny particularly with time, place, and manner restrictions, whereby the government must demonstrate that the regulation furthers an important government interest by means that are substantially related to that interest. *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *see also United States v. O'Brien*, 391 U.S. 367 (1968) (upholding prohibition against burning draft cards to protect government interest in facilitating smooth function of the draft systems and establishing a four-part test for whether content-neutral regulations are constitutional). Content-based restrictions are subject to strict scrutiny and requires the government demonstrate its regulation is narrowly tailored and necessary to accomplish a *compelling* interest. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2231 (2015) (holding that a town's Sign Code constituted a content based regulation on speech which could not survive strict scrutiny "requiring the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest").

However, there are limited categories of content-based speech which do not receive protection including: obscenity, *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Miller v. California*, 413 U.S. 15 (1973); defamation, *New York Times v. Sullivan*, 376 U.S. 254 (1964); fighting words, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (942); and true threats, *Virginia v. Black*, 538 U.S. 343 (2003).

protected under the First Amendment. To assess whether a statement is "rhetorical hyperbole," courts look to whether a reasonable person would determine the publication is a statement of fact by evaluating: (1) the statement "as a whole in light of the surrounding circumstances," *Campbell v. Clark*, 471 S.W.3d 615, 625 (Tex. App. 2015); and (2) whether the language was used in a literal, precise sense or a loose, figurative manner, *see Cianci v. New Times Pub. Co.*, 639 F.2d 54, 64 (2d Cir. 1980).

A. Mr. Lansford's post is rhetorical hyperbole because no reasonable person would believe his statements to be asserting facts within the context and circumstance of the heated political debate in which they arose.

Absent a concrete test from this Court to determine whether a challenged statement is one of opinion protected by First Amendment, or is false and defamatory, many lower courts have determined that "[c]ontext is crucial and can turn what, taken out of context, appears to be a statement of fact into 'rhetorical hyperbole,' which is not actionable." *Ollman v. Evans*, 750 F.2d 970, 1000 (D.C. Cir. 1984). "To determine whether a statement purports to state actual facts about an individual, the Court scrutinizes the meaning of the statement in context." *Mink v. Knox*, 613 F.3d 995, 1005 (10th Cir. 2010). Mr. Lansford argues that the most practical test to outline the characteristics of rhetorical hyperbole is utilized by the Eleventh Circuit, which focuses its inquiry not on whether the statement is sufficiently factual to be defamatory, but whether the statement is protected as rhetorical hyperbole considering the circumstances in which the statement was expressed. *Horsley v. Feldt*, 304 F.3d 1125 (11th Cir. 2002).

Context and circumstance such as the location and nature of an exchange are vital components to evaluating the relative hyperbolic nature of a statement. *See Greenbelt Coop. Pub. Ass'n v. Bresler*, 398 U.S. 6 (1970). In *Bresler*, a real estate developer negotiating with a local city council to obtain zoning ordinances for his property brought suit against a local newspaper for describing his negotiations as "blackmail." *Id.* at 13. The Court noted that the highly public and

controversial debates between Bresler and the city council, which had become a substantial concern to members of the community, contributed to the understanding that the term "blackmail" was being used within the context of this natural tension. *Id.* at 14. Ultimately, the Court held that the statements characterizing plaintiff's negotiating position as blackmail were not defamatory but instead were "vigorous epithets used by those who considered [the plaintiff's] negotiating position extremely unreasonable," and, because statements were made during "tumultuous" city council meetings where "the debates themselves were heated, as debates about controversial issues usually are," they did not constitute defamation. *Id*. at 13.

Whether an alleged defamatory phrase is used as common parlance or pejorative definition as a historical response is relevant to evaluating its rhetorical hyperbolic quality. *See Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 284 (1974). In *Letter Carriers*, appellees brought suit claiming that as part of a local union's campaign, it published a monthly newsletter including a list of those who had not joined the union under the heading "List of Scabs." *Id.* at 267. The list was followed up by trade union literature supplying a definition of "scab" expressed in extremely derogatory language,[3] including the word "traitor." *Id.* at 268. Looking at its jurisprudence, the Court recognized that such exaggerated rhetoric was commonplace in labor disputes and protected by federal law. *Id.* at 286. It was a familiar piece of trade union literature and, based on testimony in this case, it had been published countless times in union publications over the last 30 years. *Id.* Thus, within the context and circumstance the statements appropriately fell within the category of rhetorical hyperbole.

[3] The literature stated verbatim: "After God had finished the rattlesnake, the toad, and the vampire, He had some awful substance left with which He made a *scab*. . . A scab is a two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles.. . . No man (or woman) has a right to scab so long as there is a pool of water to drown his carcass in, or a rope long enough to hang his body with. Judas was a gentleman compared with a scab. For betraying his Master, he had character enough to hang himself. A scab has not." 418 U.S. at 268.

Context and circumstance surrounding a statement also lend light to understanding the theme and tone of the exchange in which the language arose and whether or not a reasonable person would believe it to be true. *Horsley v. Rivera*, 292 F.3d 695 (11th Cir. 2002). In *Rivera*, Horsley, an anti-abortion activist known for publishing the names, addresses, and Social Security numbers of abortion physicians' online, graphically crossed out a doctor's entry after he was murdered in his home. *Id.* at 688. Horsley made an appearance on a news and talk show hosted by Rivera where he confronted Horsley about publishing people's personal information on his website which ultimately lead to the murder of the doctor. *Id.* at 699. Specifically, Rivera argued that Horsley was "aiding and abetting in homicide," had "blood on his hands," and ultimately was "an accomplice to homicide" by continuing to facilitate the website and encourage anti-abortion extremism. *Id.* at 700. On appeal, the Eleventh Circuit held that Rivera's statements were protected under the First Amendment after examining the context and considering that the parties were engaged in an emotional debate on a highly sensitive topic, which weighed in favor of the conclusion that "a reasonable viewer would infer that Rivera's statement was more an expression of outrage than an accusation of fact." *Id.* at 702. The Eleventh Circuit concluded that review of the interview exchange made it clear that the parties were engaged in dialogue on an animated, non-literal level[4] and, thus, the statement that Horsley was an accomplice to murder was protected as non-literal rhetorical hyperbole. *Id.* at 703.

The sort of robust political debate encouraged by the First Amendment is "bound to produce speech that is critical of those who hold public office or those public figures who are

[4] "Most significant is that Horsley himself acknowledged that he understood Rivera to be speaking in a figurative rather than literal sense as soon as Rivera's statement was made, . As soon as Rivera stated, 'You are an accomplice to homicide, Mr. Horsley,' Horsley retorted 'You are too, because you're - you're showing exactly the same information…. You're a collaborator just like I am, if that's true.'" *Id.* at 702. The court found that based on this response, it was clear that Horsley believed Rivera was speaking on a figurative level, and also by his own statements Horsley created the impression that the dialogue was taking place on a non-literal plane. *Id.*

‘intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.’” *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988). “Such criticism, inevitably, will not always be reasoned or moderate; public figures as well as public officials will be subject to "vehement, caustic, and sometimes unpleasantly sharp attacks.” *New York Times*, 376 U.S. at 270. In the case at bar, Mr. Lansford’s statements, when considered within the surrounding context and circumstance, are rhetorical hyperbole because they are the product of an active political debate. Similar to *Bresler*, where the newspaper described Bresler has having “blackmailed” the city counsel, the terms used by Mr. Lansford towards Respondent, specifically: “a pimp for the rich” “a leech on society” “a whore for the poor” “corrupt and a swindler” (J.A. at 5, 18) are not alleging actual crimes or literal insidious character flaws. Rather, both the statements in *Bresler* and in this case encapsulate disagreements and figurative exaggeration regarding how Bresler and Respondent conducted themselves within the scope of action that encouraged both statements.

Additionally, the terms “corrupt and a swindler,” “a leech on society,” etc., are not defamatory and constitute rhetorical hyperbole when evaluated within the history of the adversarial political system (J.A. at 4, 18). In *Letter Carriers*, the court found that while the usage and definition for “scab” in union literature was objectively rude and offensive, it was nevertheless a common and familiar feature of union disputes and thus was not defamatory. 418 U.S. at 286. Similarly, referring to someone as a corrupt or a swindler, a “leech on society,” or a “pimp for the rich,” while objectively impolite phrases, are nonetheless variations of anticipated character assassinations for those who are politically engaged or public officials. Thus, this Court should find that within the context of political engagement, these statements are expected variations of allegations made in some form to most public or political figures. Mr. Lansford’s version clearly

falls in line as an example of rhetorical hyperbole for political characters similar to the John London definition of a scab for non-union members in *Letter Carriers*.

Thus, in addition to considering the surrounding political context and circumstance of the statement, this Court must evaluate the exchange in which it arose. Upon review of the interview exchanges in *Riviera* and consideration of the sensitive and charged nature of the topic at issue, it was clear to the Eleventh Circuit that the statements accusing Horsley of being an accomplice to homicide were clear hyperbole inherent in the subject matter and animated nature of discussion. 292 F.3d at 702. In our case, Respondent initiated the political mudslinging when she posted a column on her website during Lansford's mayoral run, claiming he is an entrenched incumbent, beholden to special interests. (J.A. at 3, 17). More nefariously, Respondent claimed that Lansford was anti-poor, anti-diversity, and a plutocrat (J.A. at 4, 18)[5]. Just as a debate on the morality of abortion in *Rivera* led the Eleventh Circuit to determine that the alleged defamatory statements were rhetorical hyperbole fitting the situation, Mr. Lansford's passionate response to Respondent's attack on his character constitutes hyperbole here. This is consistent with precedent that "[e]xpressions of opinion may be derogatory and disparaging; nevertheless, they are protected by the First Amendment. . ." *Clifford v. Trump*, 339 F. Supp. 3d 915, 925 (C.D. Cal. 2018) (quoting *Shaw v. Palmer*, 197 S.W.3d 854, 857 (Tex. App. 2006)). Lansford's responding remarks that Respondent is a "pimp for the rich" and a "whore for the poor" clearly comprise rhetorical hyperbole such that no reasonable viewer could interpret the phrases as actual facts. Thus, within the circumstances and context, Mr. Lansford's statements were appropriately hyperbolic and not defamatory.

[5] Her column specifically stated Lansford engaged in a war on the economically strapped citizens by imposing more police patrols; that his repressive measures led to displacement; and that by negative implication he does not care about people of different races, genders, and ethnicities. (J.A. at 4, 18).

B. Mr. Lansford's post is clearly exaggerated, loose, and figurative hyperbolic language and was not presented in a literal tone which would lead a reasonable reader to believe it to be true.

Rhetorical hyperbole is, at its core, a vigorous epithet used to describe a thing in an exaggerated or figurative way. It is premised on the idea that parody, fantasy, rhetorical hyperbole, and imaginative expressions negate the impression of an individual seriously maintaining their statement as an assertion of fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). Rhetorical hyperbole, a "lusty and imaginative expression" of the speaker's perception, is therefore essential to maintain the breathing space necessary for protected expression. *Letter Carriers*, 418 U.S. at 286. A published statement that is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" cannot constitute a defamatory statement. *Milkovich*, 497 U.S. at 32. The constitutional protection provided rhetorical hyperbole "reflects 'the reality that exaggeration and non-literal commentary have become an integral part of social discourse.'" *Rivera*, 292 F.3d at 701 (quoting *Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997)).

It is necessary to assess the relative absurdity or outrageousness of a statement when determining whether it constitutes rhetorical hyperbole. *See Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). Generally, the more exaggerated the idea of the statement is, the more likely it is it could not reasonably be interpreted as a factual assertion. *See generally New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 159 (Tex. 2004) ("satiric effect emerges only as the reader concludes by the very outrageousness of the words that the whole thing is a put-on."). In *Falwell*, Hustler magazine was sued by a nationally known minister for featuring a parody advertisement which depicted the minister interviewing about his "first time." *Id.* at 48. The magazine's parody interview alleged that the minister stated his first time was during a "drunken incestuous rendezvous with his mother in an outhouse," it also suggested that he preaches only when drunk. *Id.* Both the jury and, later,

this Court found that the language of the ad parody was so clearly hyperbolic it could not reasonably be understood as describing an actual event or experience. *Id.* at 57.

"In all types of discourse, the courts must analyze the allegedly defamatory statement to determine whether it has a sufficiently definite meaning to convey facts." *Ollman v. Evans*, 750 F.2d 970, 981 (D.C. Cir. 1984). *See also Phantom Touring, Inc. v. Affiliated Publications*, 953 F.2d 724, 727 (1st Cir. 1992)(calling a play "a rip-off, a fraud, a scandal, a snake-oil job" was mere hyperbole and constitutionally protected). Thus, in *Letter Carriers v. Austin*, the relative exaggerated content of a union newsletter which had listed the plaintiffs as "scabs" and which reprinted literature including terms like "traitor" led to court to hold the statements were not defamatory. The alleged defamation included suggestions that "where others have hearts, [a scab] carries a tumor of rotten principles" such that "no one has a right to scab so long as there is a pool of water to drown their carcass in, or a rope long enough to hang his body with" *Id.* at 268. This Court reasoned that such words could not be construed as representations of fact because they were "obviously used in a loose, figurative sense to demonstrate the union's strong disagreement with the views of those workers who opposed unionization." 418 U.S. 264, 283-84. The union literature's use of words like "traitor" cannot be construed as representations of fact but, rather, "loose language or undefined slogans part of the conventional give-and-take in our economic and political controversies. . . ." *Id.* at 284 (quoting *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)).

Rhetorical hyperbole receives constitutional protection because if no reasonable person would take these types of speech as true, they simply could not impair one's good name. The converse of which suggests that if the style, language, and tone of a statement would render a reasonable reader to believe it assertion as fact, it is not protected. *Milkovich*, 497 U.S. at 18.

Milkovich concerned a high school wrestling coach whose team was involved in an altercation resulting in an athletic association investigation. *Id.* at 4. Parents and wrestlers of the team pursued litigation challenging the investigation's ruling of probation in which Milkovich testified at formal proceedings. *Id.* After the court overturned the probation, a local newspaper circulated a column discussing the case which included a passage that stated: "[a]nyone who attended the meet, . . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth." *Id.* at 5. Milkovich brought suit claiming that the newspaper's statements were defamatory because they accused him of committing perjury, damaged his reputation, and constituted libel per se. *Id.* at 7. Looking at the language used and general tenor of the publication, this Court concluded that the specific diction and tone did not have the figurative qualities of hyperbole which would otherwise denote to a reader that the publication was not asserting a fact. *Id.* at 18. Thus, the newspaper's statements were not protected under the First Amendment. *Id.* at 22.

Similar to the imaginative exaggerations in *Falwell*, where the magazine column suggested an incestuous relationship between a minister and his mother, the language in the case at bar is clearly hyperbolic. 485 U.S. at 48. Specifically, the portions of Mr. Lansford's post referred to as alleged defamatory statements are merely Respondent's personal objections to Mr. Lansford's use of the words "whore" "pimp" "leech." (J.A. at 4, 18). These are obviously embellished rhetoric and are not used as literal phrasing to suggest that Respondent is prostituting herself, pimping others, and sucking resources from society. Just as this Court found the parody ad to be inherently exaggeration in *Hustler*, the fundamentally hyperbolic nature of the terms as used in Mr. Lansford's demonstrates they are not to be taken literally. False statements of fact are generally non-actionable as defamation under the First Amendment if any reasonable person would

recognize the statements as parody. *See also Ollman*, 750 F.2d at 1000 (“It is not unusual to protect false statements of fact “where, because of the context, they would have been understood as part of a satire or fiction.”) (Bork, J., concurring and citing *Pring*, 695 F.2d at 443).

The richness and diversity of language allows us to convey words with a multitude of meanings in different contexts, and the literal as opposed to loose use of language in exaggerations clearly demonstrates this. In *Letter Carriers*, the union literature definition of a “scab,” which included, “where others have hearts, [a scab] carries a tumor of rotten principles” and that “no one has a right to scab so long as there is a pool of water to drown their carcass in, or a rope long enough to hang his body with” (*see supra*, note 2), while clearly offensive to those who were ‘scabs’ at the time, nevertheless embodied a hyperbolic meaning rather than a literal assertion that nonunion members should be drowned and hung. Likewise, had the publication said “Ms. Courtier actively engages in prostitution with lower income members of the community,” the precise statement would not be protected. However, evaluative statements reflecting political, moral, or aesthetic views, such as, "Ms. Courtier is a pimp for the rich and a whore for the poor," (J.A. at 4, 18) are figurative, exaggerated language, and therefore clearly embody rhetorical hyperbole.

These written examples provided in our case stand in stark contrast to the tone and literal language usage seen in *Milkovich*, where the newspaper publication straightforwardly accused Milkovich of committing perjury. 497 U.S. at 5. There, the publication was deemed to have asserted a factual statement injurious to the reputation because the word choice and tenor of both articles were such that a reasonable person would believe it to be true. *Id.* at 18. Conversely, the statements made by Mr. Lansford on his website are qualified by their reactive tone to Respondent’s own post, and do not ever explicitly state or accuse Respondent of having committed an actual crime associated with the pejorative language used. In its entirety, the post conveys a

quality of defiance and incredulity as a response to the accusations from Respondent that Mr. Lansford was a plutocrat, entrenched, and beholden to special interests (J.A. at 3, 17). Mr. Lansford using language more commonly heard in rap music (namely the terms "pimp" and "whore"), in addition to his clear characterization of Respondent's personality flaws as an attempted "modern-day Robinita Hood" (J.A. at 4, 18) holistically prove that the tone and scope of the word's falls into the realm of imaginative expression rather than a false assertion of fact.

Correspondingly, in a recent opinion by the United States District Court for the Central District of California, *Clifford v. Trump*, 339 F. Supp. 3d 915 (C.D. Cal. 2018), the court found that a tweet by Donald Trump which stated: "A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it)!" constituted rhetorical hyperbole and was ultimately non-actionable as defamation. *Id.* at 926. Specifically, the court emphasized the context of the tweet, the specific language, and the incredulous tone used by Mr. Trump to support its finding that the tweet's meaning would not be read as asserting facts in a literal sense by any reasonable reader. *Id.* at 928.

The reasonable or ordinary person standard has been universally incorporated into court determinations of the relative hyperbolic quality of statements by providing an accurate lens to evaluate what speech truly ought to be actionable. By doing so, courts have made it so that only statements which a reasonable person would not recognize as hyperbole, and thus could be assumed to have an injurious effect on the subject, fall outside of First Amendment protections. Specifically, as with Mr. Trump's tweet in *Clifford* discussing a "total con job" and "playing the fake news media for fools," 339 F. Supp. 3d at 926, the incredulous tone and outlandish and use of language by Mr. Lansford, namely: "coddler of criminals," "lusty lush," "leech," "hoity-toity," "pimps out clothes to the rich and lavish," and "hoodwinks the poor into thinking she is some kind

of modern-day Robinita Hood," (J.A. at 4, 18), possess such clearly hyperbolic undertones that, like *Clifford,* the content of Mr. Lansford's post was not meant to be understood as a literal statement about Respondent. No reasonable person could interpret it as such. Therefore, this Court should find that Mr. Lansford's statements constituted non-actionable rhetorical hyperbole, and reverse the lower court's decision.

CONCLUSION

For the foregoing reasons, Mr. Lansford respectfully requests that this Courts REVERSE the decision of the Supreme Judicial Court of State of Tenley.

Respectfully Submitted,

Team No. 219531
Counsel for Petitioner